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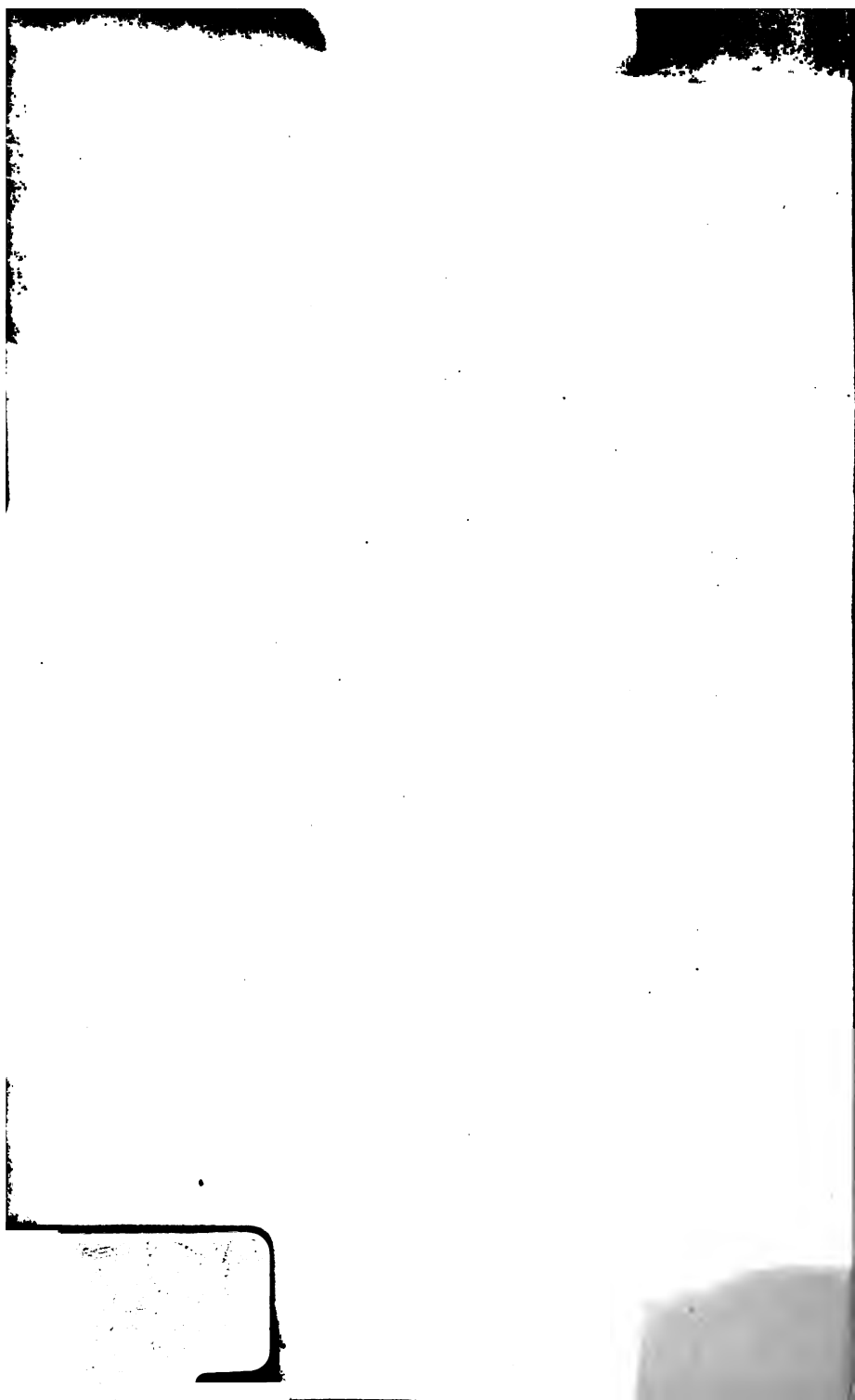
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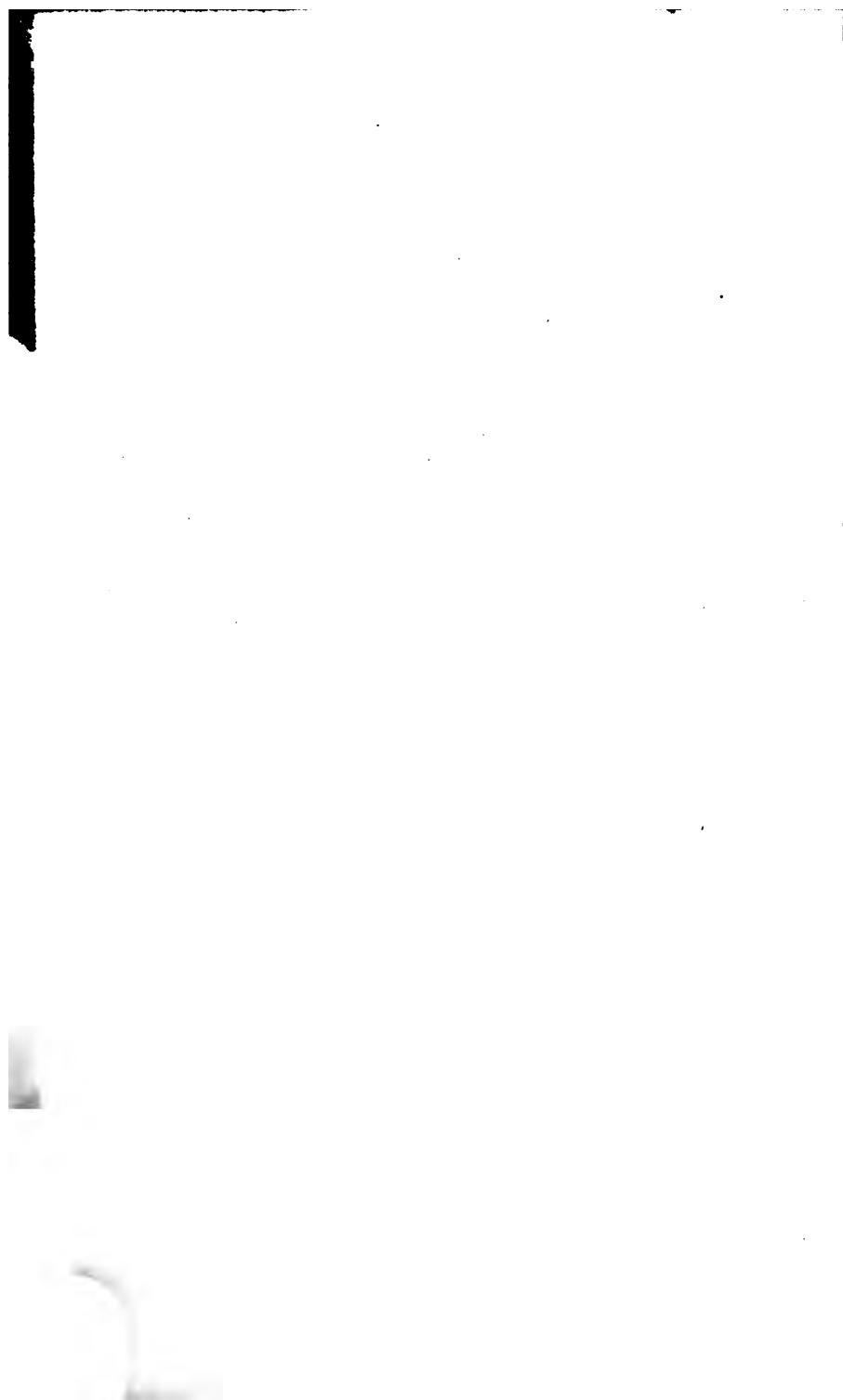
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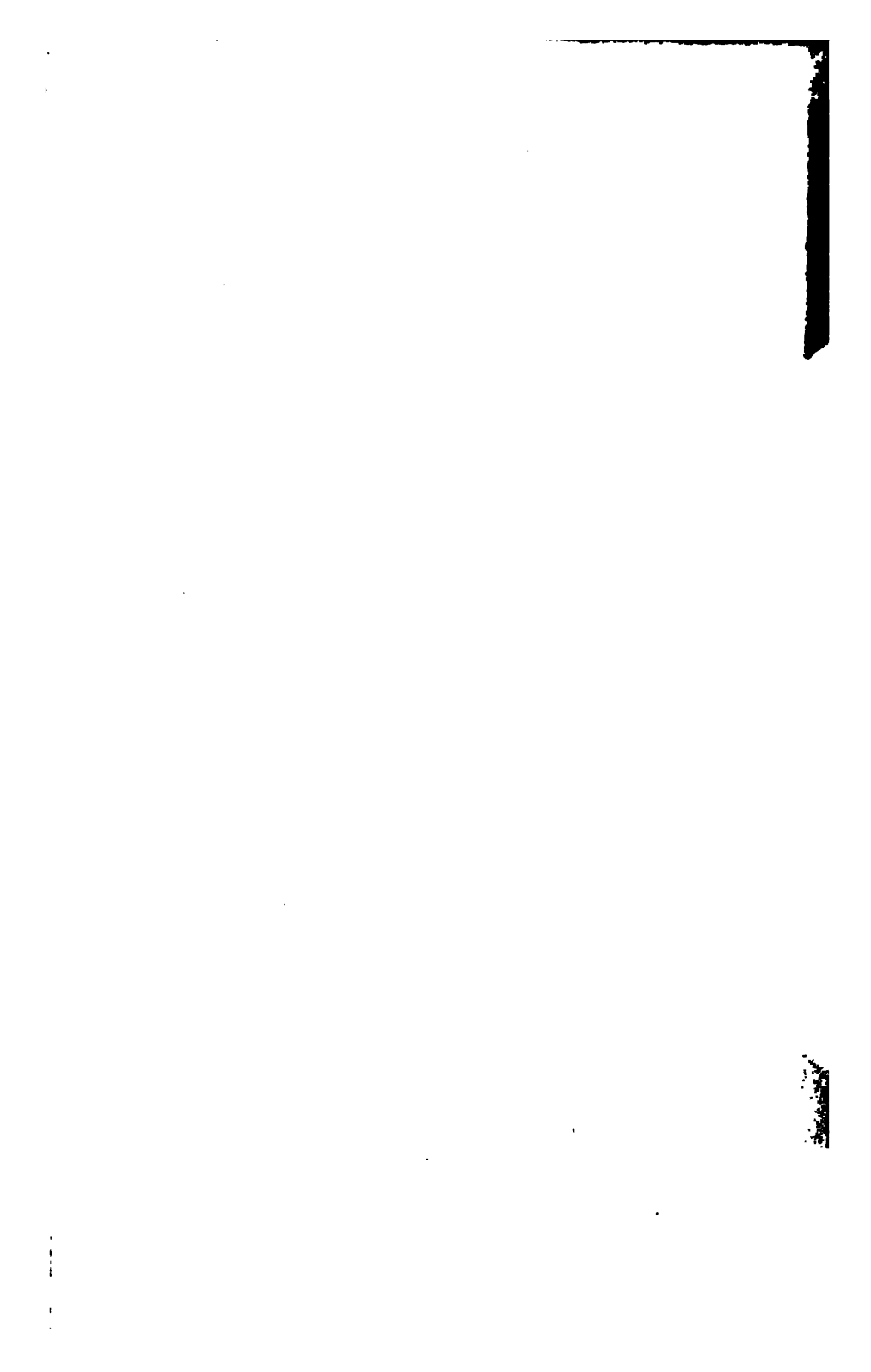
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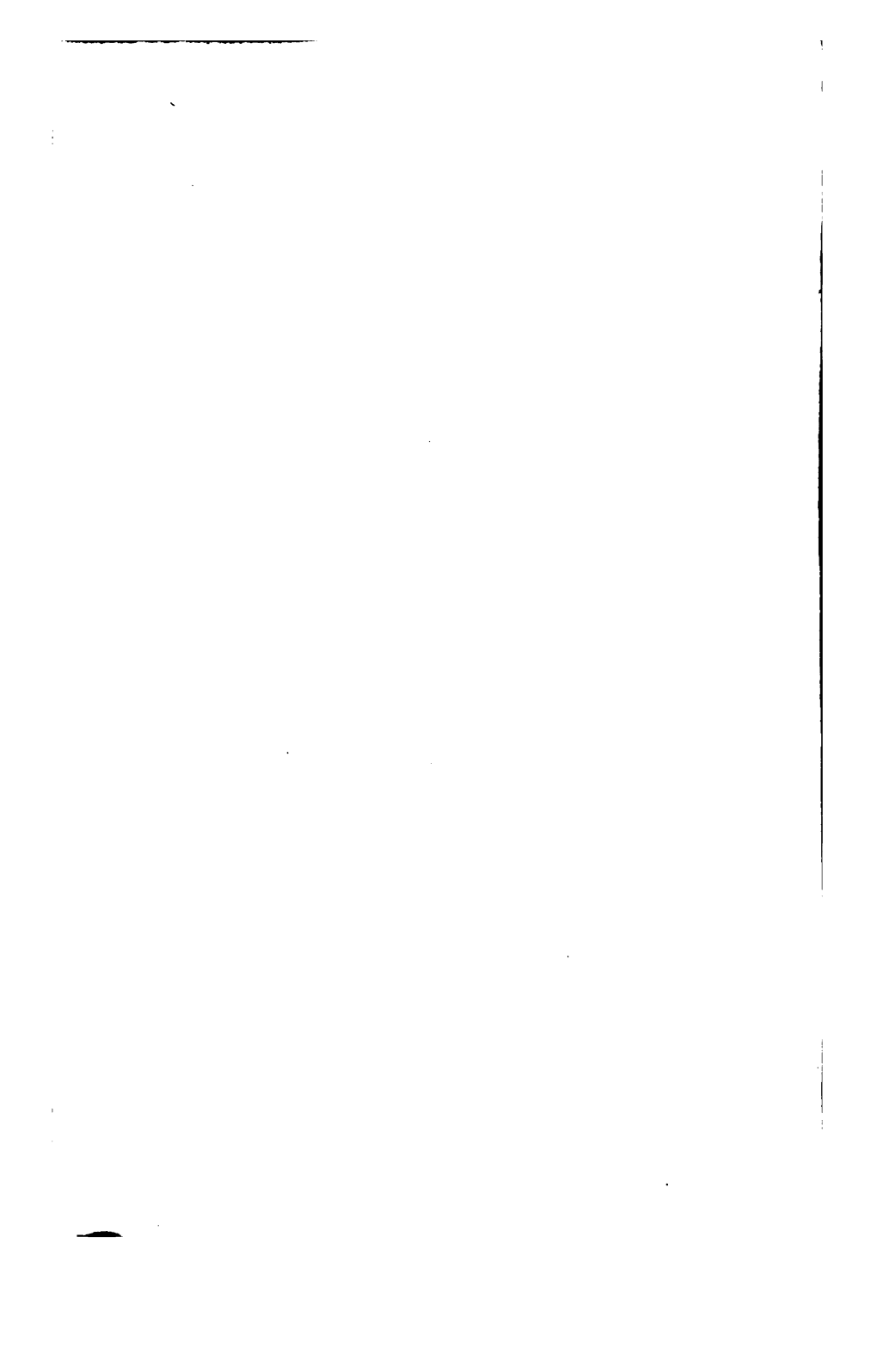
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V.3







THE
HISTORY
OF THE
CASES
OF
Controverted Elections,

WHICH WERE
TRIED AND DETERMINED
During the First and Second Sessions of the Fourteenth
Parliament of Great Britain, 15 & 16 GEO. III.

BY THE RIGHT HONOURABLE
SYLVESTER DOUGLAS,
LORD GLENBÈRVIE.

Mais si les tribunaux ne doivent pas être fixes, les jugemens doivent l'être
à un tel point, qu'ils ne soient jamais qu'un texte précis de la loi. S'ils étoient
une opinion particulière du juge, on vivroit dans la société sans sçavoir pré-
cisément les engagemens que l'on y contracte.—L'Esprit des Loix, liv. xi. c. 6.

Quod neque infecti gratiâ, neque perfringi potentiâ, neque adulterari pecu-
niâ possit.—Cic.

IN FOUR VOLUMES.
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P R E F A C E.

WHEN I published the first and second volumes of this book, I had not entirely resolved, and, therefore, did not undertake, to continue the collection. I have now, in the two following volumes, completed the plan I originally formed in my own mind; which was, to give the history of all the causes that took their rise at the last General Election, as well as of those, which, being occasioned by accidental vacancies, should happen to be tried during the same sessions with the others. Though I can say, without affectation, that I am conscious the imperfections of the foregoing part would require an apology for this continuation, yet I do not mean to trouble the reader with any. The best, perhaps, I could offer, would only be the common excuse of the encouragement of my friends: a species of encouragement, which authors, from a pleasing, but often fatal illusion, are too apt to mistake for the voice of the Public.

The principal intention of this Preface is to make the reader acquainted with some of the established rules relative to the presentation of petitions complaining of undue elections, on the second, or any subsequent session of Parliament, after a General Election.

I. The annual order mentioned in the Introduction (1), is always expressed in the same words, whether in the first, second, or other subsequent session of a Parliament: *viz.*

Ordered, "That all persons who will question
" any returns of members to serve in Parliament,
" do question the same within fourteen days next,
" and so within fourteen days next after any new
" return shall be brought in." (2).

But the construction is this: On the second, or any subsequent, session, no petitions can be received, even within the fortnight, unless, 1. Where the same election has been complained of, in the foregoing session, and the cause has not been tried; which happens when the day fixed for taking the first complaint into consideration has been posterior to the rising of the Parliament; 2. Where, in the

(1) *Supra*, vol. i. p. 45, 46.

(2) Votes, 5 Dec. 1774; p. 5, and 27 Oct. 1775, p. 9.

case of a vacancy, there has not been, in the preceding session, a fortnight between the time when the return was brought in, and the end of the session; 3. When the election complained of has taken place, in consequence of a vacancy, between the two sessions, or after the commencement of the new one.—In the first session of this Parliament, an instance occurred of the great rigour with which the House adheres to the limitation in the case of original petitions (1). In the last, the like strictness was observed with respect to the presenting a new petition, complaining of an election which had been already petitioned against. The Honourable George Keith Elphinstone had, in the former session, presented a petition, questioning the election of the sitting member for the county of Dunbarton, in Scotland (2); but there was no trial of the cause before the Parliament rose. In the mean time, Mr. Elphinstone, being a captain in the navy, was obliged to go abroad on the King's service. The annual order of limitation for the last session was made on the 27th of October, 1775. On the 10th of November, the last day of the fortnight, Captain Elphinstone was not returned; but Mr. Seton, who had been his agent

(1) *Supra*, vol. i. p. 84, 85.

(2) 12 Dec. 1774, Votes, p. 66.

on the former occasion, offered to give information to the House, touching his intention of renewing his petition, and of the time of his going to sea, and of his being at that time abroad on his Majesty's service. A motion, however, being made, and the question put, for Mr. Seton's being called to the bar, and examined, it passed in the negative. Then a motion being made, and the question put, "That the Honourable George Keith Elphinstone be allowed fourteen days more, from this day, to present his petition to the House, complaining of the election and return of Sir Archibald Edmonstone, Baronet," (the fitting member): this too passed in the negative (1).

It ought, however, to be observed, on this case, That Mr. Seton did not produce any authority from Captain Elphinstone, to appear as his agent, or to make an application for longer time in his name: That it was on this ground, that the motion for examining *him*, was rejected: That the question produced a division: And that, after all, many of Captain Elphinstone's friends, in the House, thought that he might still apply, *himself*, for leave to petition, on his return to England, and that the House would grant it. In fact, al-

(1) 10th Nov. 1775, Votes, p. 70.

though

PREFACE.

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though he returned soon afterwards, he never made any such application.

II. When a new petition is presented, complaining of an election already petitioned against in the former session, the new petition must be *the same in substance* with the former; that is, it must not contain any new allegations. If it does, it will not be received. On a moment's reflexion it will be evident, that this rule is necessary, in order to give to persons in possession of seats in Parliament, the full advantages intended by the order for the limitation of the time of petitioning against them; and though, I believe, there is no general resolution or order for it, it is understood to be the established law of Parliament, and has been so for at least near a century. See the cases of St. Ives (14th December, 1694 (1).) Reading, (15th of the same month, (2).) Wigan, (31st January, 1699-1700 (3).) and Mitchel (5th and 6th March, 1699-1700 (4).) in which the Committees of privileges and elections were discharged from proceeding on renewed petitions, because

- | | |
|--------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|
| <p>(1) Journ. vol. xiii. p. 62.
col. 2. p. 63. col. 1.</p> <p>(2) Same vol. p. 64. col. 2.
p. 83. col. 1, 2.</p> | <p>(3) Same vol. p. 162. col.
2.</p> <p>(4) Same vol. p. 268. col. 1.
p. 271. col. 2.</p> |
|--------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|

they

they were not the same in substance with those originally presented.—The reader will recollect, that, after the cause concerning the validity of the *return* for the borough of Morpeth had been decided last year, leave was given to Mr. Eyre, and the electors, to petition, within a fortnight from the time of the decision, on the merits of the election; and that, accordingly, Mr. Eyre did present a petition on the merits (1). The day fixed for taking his petition into consideration, was the 12th of July, 1775. Before that time, the Parliament rose. He therefore had liberty to re-petition at the beginning of the last session, and actually did so, on the 31st of October, 1775; when an order was made for taking his new petition into consideration on the 26th of January following (2). On comparing this petition with that of the former session, it was thought to contain certain new allegations (3). Upon this, it was moved in the House, on the 23d of November, 1775, that a Committee should be appointed to examine, whether the two petitions of Mr. Eyre, were the same in substance; and, after some debate on the subject, a Committee

(1) *Supra*, vol. i. p. 153, 154. tions, 8th February, 1775, Votes, p. 196; and 31st October, 1775, Votes, p. 32,

(2) Votes, p. 33.

(3) Compare the two petitions, 33.

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was appointed. One of the objections urged against the appointment of this Committee was, That the matter was taken up too late; that the difference (if there really was a substantial difference) between the two petitions, should have been observed when the last was presented; that now, a day, for chusing a Committee to try the cause, having been fixed, the House could no longer take any original cognisance of the matter; but that it should be left to the Committee to be chosen under Mr. Grenville's act, to discover the supposed variance, and report it to the House. This objection was over-ruled; and, as it should seem, with reason, because it is as just, that the House, after a new petition has been received, and a day named for taking it into consideration, should be able, on the suggestion of an essential variation from the former, to take the proper measures for enquiring into that point, and, if necessary, for discharging entirely the order appointing a day for taking it into consideration, as that, after such order, they should have it in their power to put an end to the cause, by giving leave to the party to withdraw his petition.—The very day after the Committee of enquiry was appointed in the present case, Mr. Eyre applied for, and obtained, leave to withdraw *his*; upon which, the order

order appointing the Committee of enquiry was discharged (1).

III. The last rule I shall mention is with regard to cases where, the same person being returned for two places, there is a petition against his election for one of them. Such person cannot choose which he will serve for, till the merits of the election complained of are decided; because, till then, it cannot be ascertained, that he was legally chosen for both places. It is improper that a person who has been thus *double-returned* should, in any instance, make his option *before the fortnight for petitioning is expired*,* because till then *either* of his elections may be complained of; and if, on a complaint concerning one of them, it should be decided, that such election was void, he would be under a necessity of representing the other place.

(1) Votes, 24th November, 1775, p. 122. should appear that the person returned was not duly chosen,

* [After the fortnight for petitioning is expired, and no petition has been presented for one of the places, still the option is not allowed till the merits of the petition for the other place are determined; because, if on the trial of that petition it should appear that the person returned was not duly chosen, he is in such case *obliged* to sit for the other place. (See the case of Bristol, *supra*). It would therefore be absurd to let him make his option before the trial, because till that is over *non constat* that he has a right of option.]

But

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But the matter is carried still farther. If a petition has been presented in a former session, against a person double-elected; and there has been no trial during that session, the petitioners have a fortnight at the beginning of the next to renew their complaint: Now, in such a case, although the member should make his election to serve for the place where his right is *not* disputed, yet the House will not order a warrant for a new writ to fill the seat he may have declined, till the expiration of the fortnight; unless, perhaps, the former petitioners were themselves to inform the House that they waive their right, and do not intend to renew their petition.—In the first session of this Parliament, several freeholders of the county of Westmoreland petitioned the House, complaining of the election of Sir James Lowther, Bart. for that county (1). There was no trial of this cause before the end of the session. On the 11th day of the fortnight, in the last session, “The Speaker acquainted the House, that he had received a letter from Sir James Lowther, who was prevented by illness from attending his duty in the House, to inform him, that (having received information from the several persons who were the petitioners from the county of Westmore-

(1) 17th Dec. 1774, Votes, p. 91.

“ land

“ land in the last session of Parliament, that they
“ will not renew their petition) he, being chosen a
“ knight of the shire to serve in this present Par-
“ liament for the county of Cumberland, and also
“ a knight of the shire for the county of West-
“ moreland, made his election to serve for the said
“ county of Cumberland.

“ And a motion being made, and the question
“ being proposed, That Mr. Speaker do issue his
“ warrant to the clerk of the Crown, to make out
“ a new writ for the electing of a knight of the
“ shire to serve in this present Parliament for the
“ county of Westmoreland, in the room of the
“ said Sir James Lowther ;

“ The House was moved, That the petition of
“ several freeholders of the county of Westmore-
“ land, who have thereunto subscribed their
“ names, which was presented to the House upon
“ the 17th day of December, in the last session of
“ Parliament, might be read.

“ And the same was read accordingly.

“ Then the question being put, That Mr.
“ Speaker do issue his warrant to the clerk of the
“ Crown, to make out a new writ for the electing
“ of a knight of the shire to serve in this present
“ Parliament for the county of Westmoreland, in
“ the room of the said Sir James Lowther ;

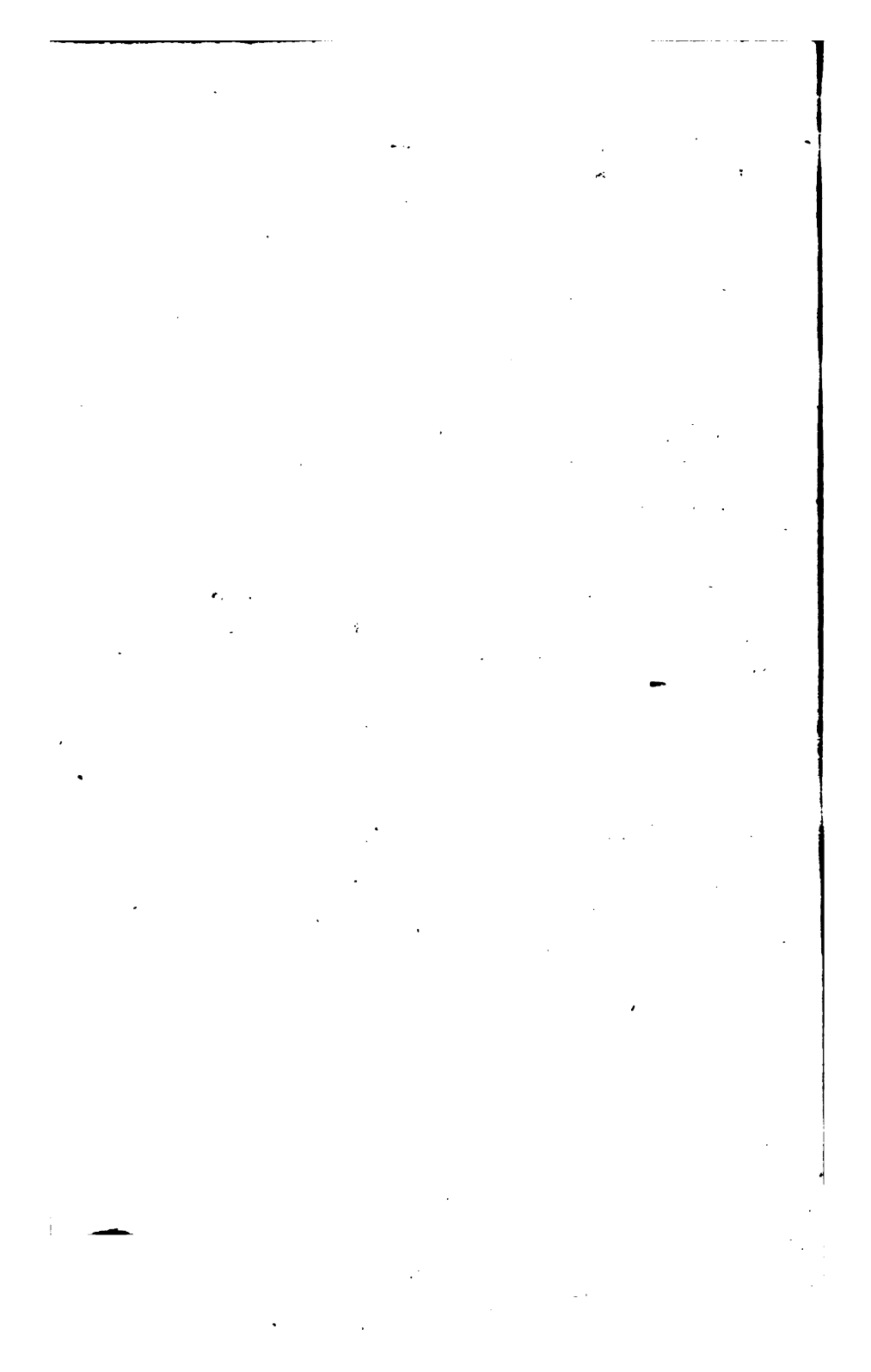
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“ It passed in the negative (1).”

The method here taken of communicating the intention of the former petitioners to drop their complaint, was not thought sufficient to justify the House in ordering a new writ, There was no immediate information in the name of the petitioners themselves.—On the 13th of November, the fortnight being expired, and no renewed petition having been presented, a new writ was ordered for Westmoreland (2).

(1) 7th Nov. 1775, Votes, p. 53, 54. (2) Votes, p. 78.



XXV.

THE

C A S E

Of the BOROUGH of

P E T E R S F I E L D,

In the County of SOUTHAMPTON.

VOL. III.

B

✂ The day appointed for choosing this Committee was Tuesday, the 14th of November, 1775; but the House not being complete, according to the provisions of the statute (1), they were obliged to adjourn to the day following (2).

On Wednesday, the 15th of November, the Committee was chosen, and consisted of the following Gentlemen :

John Elwes, Esq. Chairman -	-	} Members for	Berkshire.
Earl Verney - - - - -	-		Bucks.
Earl of Tyrconnel - - - - -	-		Scarborough.
Sir Henry Hoghton, Bart. -	-		Preston.
Viscount Palmerston - - - -	-		Hastings.
Hugh Boscawen, Esq. - - - -	-		St. Mawes.
Benjamin Langlois, Esq. - - -	-		St. Germans.
Thomas More Molyneux, Esq. -	-		Haslemere.
William Drake, jun. Esq. - - -	-		Agmondesham.
Hon. Thomas Villiers Hyde -	-		Christchurch.
Charles Mellish, Esq. - - - -	-		Pontefract.
Sir William Bagot, Bart. - - -	-		Staffordshire.
George Bridges Brudenell, Esq.	-		Rutlandshire.
NOMINEES,			
<i>Of the Petitioner :</i>			
Hon. Thomas Howard - - - -	-	S. Michael.	
<i>Of the Sitting Members :</i>			
Bamber Gascoyne, Esq. - - - -	-	Truro.	

PETITIONER :

The Honourable John Luttrell.

Sitting Members :

Sir Abraham Hume, Baronet, William Joliffe, Esq.

COUNSEL,

For the Petitioner :

Mr. Mansfield, Mr. Lee.

For the Sitting Members :

Mr. Miffing, Mr. Hardinge.

(1) *Vide* vol. i. Introd. Sect. 3. N^o 11. p. 49, 50.

(2) Votes, 14 Nov. p. 79.

(3)

THE
C A S E

Of the BOROUGH of

P E T E R S F I E L D.

ON Thursday, the 16th of November, the Committee being met, the petition of Mr. Luttrell was read, the entry of which in the Votes is *verbatim* as follows:

31 Oct. 1775. " A petition of the Hon. John
" Luttrell was read, setting forth, That at the last
" election of members to serve in Parliament for
" the borough of Petersfield, Sir Abraham Hume,
" Baronet, *High sheriff for the county of Hertford*,
" William Joliffe, Esq. and the Petitioner, were
" candidates; and that the said Sir Abraham
" Hume and William Joliffe, [(1) by them- [4]
" selves and their agents,] after the dissolution of

(1) These words are repeated twice, but this seems to be a mistake of the printer of the Votes.

“ the last Parliament, and the issuing of the writ
“ for the election, and previous to and during the
“ poll, by themselves and their agents, and by other
“ ways and means, on the behalf, and at the charge,
“ of the said Sir Abraham Hume and William
“ Joliffe, did give, present, and allow, to the elec-
“ tors of the said borough, and to several persons
“ who had or claimed a right to vote in the elec-
“ tion for the said borough, money, meat, drink,
“ reward, entertainment and provision, in order to
“ procure themselves to be elected for the said
“ borough, in open defiance of the law ; and that
“ the said Abraham Hume and William Joliffe,
“ previous to and during the poll were guilty of
“ bribery and corruption, and attempting to bribe
“ and corrupt those who had a right to vote in
“ the said election, in order to procure themselves
“ to be returned as persons duly elected, and that
[5] “ James Showell, pretending to be the mayor of
“ the said borough, acted partially and unfairly in
“ the execution of his office, as a returning officer,
“ during the said poll, in rejecting good votes for
“ the petitioner, and admitting bad ones for the
“ said Sir Abraham Hume and William Joliffe, and
“ in many other respects; and that, by the said and
“ other undue means, the said Sir Abraham
“ Hume and William Joliffe obtained a majority
“ of votes on the poll, and were returned accord-
“ ingly to serve in Parliament for the said borough,
“ in prejudice of the petitioner (who was duly
“ elected, and ought to have been returned) and
“ the

“ the legal electors of the said borough, and in
 “ open defiance of the law and freedom of elec-
 “ tions; and therefore praying the House to take
 “ the premises into consideration, and to grant
 “ him such relief therein, as shall upon examina-
 “ tion appear to be just (1).”

Then the last determination of the right of elec-
 tion was read, which is as follows :

9 May, 1727. Resolved, “ That the right of [6]
 “ election of burgessees to serve in Parliament for
 “ the borough of Petersfield in the county of
 “ Southampton, is in the freeholders of lands, or
 “ ancient dwelling-houses or shambles built upon
 “ ancient foundations, within the said borough
 “ (2).”

Then the standing order of the 16th Jan. 1735-6,
 was read (3).

✶ The counsel for the petitioner informed the
 Committee, that they did not mean to litigate the
 right of election, and that they therefore thought
 it unnecessary that either the last determination or
 standing order should be read. However, it ap-
 peared to the Committee to be the established and
 regular practice to read both, in all cases where
 there is a last determination.

The counsel for the petitioner opened their
 case by acquainting the committee that they in-
 tended,

1. To object to Sir Abraham Hume, that, being

(1) Votes, p. 27, 28. col. 2.

(2) Journ. vol. xx. p. 861. (3) *Supra*, vol. i. p. 99, 100.

high sheriff for the county of Hertford at the time of the election, he was inelegible, and that notice thereof having been given to the returning officer and to the electors, the votes given for him were thrown away.

2. To *both* the sitting members, that they had been guilty of corrupting the voters by gifts and promises after the vacancy, and issuing out of the writ, by which means the election of them was void by virtue of the statute of King William (1).

The counsel for the sitting members insisted, that it was not competent to those on the other side to go into the question concerning the supposed ineligibility of Sir Abraham Hume as sheriff of Hertfordshire, because there was no *express* allegation or complaint on that subject in the petition.

[8] They said,, That the words "*High sheriff of the county of Hertford,*" appeared in the petition merely as an *addition* or *descriptio personæ*. That there was no complaint on that account which could either lead Sir Abraham Hume to think that he was to be attacked on that ground, or indeed entitle the Committee to enter upon such a question, since it could not be considered as any part of the merits of the petition; That in every court of Justice it is a rule that the plaintiff who complains of injustice, and sues for redress, shall not, on the trial, be permitted to take up a new cause

of complaint which has not been set forth in the instrument by which he made his first application to the court. That this rule is as just as it is invariable, being calculated to prevent a surprize on the defendant, who, if he had not previous notice of every charge meant to be brought against him, might lose his cause for want of an opportunity to prepare his defence.

To this the counsel for the petitioner answered,

That the fact was clearly stated. That the petitioner had a right to avail himself of every thing that appeared on the face of the petition. That it was certainly unnecessary for him to tell the House in his petition, that Sir Abraham Hume, being sheriff, was thereby ineligible. That it was more proper to leave the law to be declared by the decision of the Committee. That nobody could suppose that the words by which the circumstance of Sir Abraham Hume's being sheriff of Hertfordshire is mentioned, were inserted merely as a title or description, such addition of the office of a sitting member never being used in petitions, because altogether unnecessary. That the petitioner, for instance, had never dreamed of describing the other sitting member by his office of one of the Commissioners of the Board of Trade. That Sir Abraham Hume, therefore, could not pretend surprize; especially as they were, they said, ready to prove that the objection to his eligibility was taken at the election, and the returning officer and electors warned, that votes given for him would be

[9]

thrown away, and that his being sheriff would be made the ground of a petition to the House of Commons. That if a sitting member were stated in a petition to be a traitor or felon convict, an idiot, &c. in the form of words used in the present instance, it could never be contended, that a Committee to whom such petition should be referred, ought to shut their eyes to a legal disability, and declare such traitor, felon, or idiot duly elected, because the words, "*and therefore ineligible*," or others to that effect, were not added *.

The counsel did not speak at great length to this objection (1). When they were directed to withdraw, the Committee deliberated for a considerable time, and then, the counsel being called in, the Chairman informed them, that the Committee had come to the following resolution :

[11] Resolved, "That the counsel be not permitted
 " to argue the point of the ineligibility of Sir
 " Abraham Hume as High Sheriff of the county
 " of Hereford, the same ineligibility not being an
 " allegation in the petition." (A).

The counsel for the petitioner then called three or four witnesses, to prove that gifts and promises had been made by Mr. Joliffe, in the presence, and with the concurrence of the other sitting member. In their opening they did not alledge that they could on this ground bring the majority of votes,

[* *Vide* Rex. v. Moor. 2 Burr. 834.]
 Mod. 128. and Rex. v. (1) *Vide infra*, Case of
 Boyall, Tr. 32 & 33 G. II. Southampton. vol. iv. p. 84.

as against either the sitting members, to be in favour of Mr. Luttrell. The object, therefore, of the evidence, was to make the election void as to one, or both.

In the course of this evidence, one John Newman was called to prove a declaration made to him by one Brackstone, a voter, about having got the promise of a house from Mr. Joliffe for his vote.

On the part of the sitting members this evidence was objected to.

It was said, that although the declaration (not upon oath) of a person who cannot be *obliged* to be a witness on the subject himself, is admissible in evidence to *affect such person*, yet it is not admissible as against a third party, and that as the counsel for the petitioner had not said that they meant to disqualify voters, but only to affect the sitting members personally, by promises, gifts, &c. which they had made, the evidence could not be admitted for that purpose. [12]

It was answered by the counsel for the petitioner, That they were not obliged to anticipate the intent and purpose of the evidence they produced. That what they now offered, was certainly competent in an election cause. And that the Committee, after they should hear it, would judge to what use it ought to be applied.

The Committee, after deliberation,

Resolved, "That the evidence offered could not be admitted in support of any charge against Sir Abraham Hume or Mr. Joliffe."

The

C A S E XXV.

The counsel for the petitioner then said they would ask the same questions, with a view to disqualify Brackstone.

Which they were allowed to do.

On Thursday, the 16th of November, being the same day on which the cause began, the Committee, by their Chairman, informed the House, that they had determined,

That the two sitting members were duly elected
(1).

(1) Votes, p. 87, 88.

N O T E S

ON THE CASE OF

P E T E R S F I E L D.

PAGE 11. (A.) In the Case of Sudbury, in 1770, there is the following entry in the Journals.

Note
(A.)

15 Feb. 1770. " The counsel for the petitioners having proposed to produce evidence, in order to prove, that
" several of the persons who voted for the sitting members
" at the last election, were not legally qualified to give their
" votes, as not being freemen of the said borough.

" The same was objected to by the counsel for the sitting members, as not being warranted by any allegation
" in either of the petitions.

" This point being agreed, and the counsel directed to
" withdraw.

" And a motion being made, and the question being put,
" that the counsel for the petitioner be admitted to produce
" evidence, to prove that many of the persons who voted
" for the sitting members at the last general election for the
" borough of Sudbury, were not legally entitled to vote for
" members to serve in Parliament for the said borough,
" there being no allegation in either of the petitions pre-
" sented

Note
(A.)

" sented to this House to warrant their producing such evidence,

" It passed in the negative (1)."

To confine the plaintiff in an election cause to the allegations in his complaint, would be a practice analogous to the rules of the ordinary courts of justice, and would not be attended with any hardship to him, for he has it in his power to make his petition as comprehensive as he thinks fit. However, the rules of the courts of Westminster Hall cannot be adopted on all occasions by Committees, because of the essential differences in the nature of the causes which they have to decide; and I confess there are difficulties attending this rigid adherence to the petitioner's complaint as set forth in the petition. Perhaps the representative body at large is in some respect to be considered as a party concerned in every controverted election. By their oath, the Committee are to swear, that they will well and truly try the *matter of the petition referred to them*. According to the strict sense of these words, if supposed to describe the limits of their jurisdiction, they are bound to confine themselves to the allegations of the petition. But, after the oath, the statute goes on to say, "and they shall be a Select Committee to try and determine the *merits of the return, or election*, appointed by the House to be that day taken into consideration:" and afterwards, (in § 18). "The said Select Committee shall try and determine the merits of the

[16] "return, or election, or both." Do not these words seem to empower the Committee to inquire into, and decide upon every thing material to the merits of the return and election, whether specified in the petition or not? Now the House of Commons at large has an interest that no candidates but those who were eligible and legally chosen, be declared duly elected by the determination of the Committee.

(1) Journ. vol. xxxii. p. 705. col. 1.

tee; and the eligibility of a candidate; whether that makes part of the matter of the petition or not, is certainly part of the merits of the election and return. Indeed, that Committee are not confined *strictly* to the matter of the petition (although that alone is mentioned in their oath) is clear from this, that they hear and determine upon the case which the sitting member chooses to make against the petitioner, although the oath has no reference to any thing of that sort. Suppose for a moment, that a sheriff is clearly ineligible by law, or rather let us take the case of a person who at his election is possessed of a new office, within the meaning of the statute of Queen Anne (1) for such a person is, by that statute, ineligible. Suppose a petition is presented complaining of his election, but without alleging that he held a disqualifying office, or was incapable of being chosen. If it come out in the course of the evidence given on other points, that he held the office, can the Committee, who, we will suppose, have found all the points litigated by the petitioner to be in favour of the sitting member, determine that such sitting member was *duly elected*? Suppose the petition has stood over for a year, and has not been renewed within the limited time (2) in the next session, and in the mean time he has divested himself of his office, there can be no *new* petition against his election, and therefore no Committee can be chosen to try it on the ground of his ineligibility. He is *now* capable of *sitting*. So that there can be no motion or enquiry in the House on that ground; and since Mr. Grenville's act, it seems to be the universal opinion, that no question can be moved in the House relative to the validity of an *election* which has been complained of by petition. Perhaps, if an ineligible person were returned, and *no* petition were presented, the House still might take cognizance of it; for it would be too much to say, that such a return could not be inquired into, although against the

[17]

(1) 6 Anne, cap. vii. § 25.

(2) *Supra*, Pref.

Note
(A.)

law of the land, unless some individual, interested as a voter or candidate, chose to petition on the subject. But, in the instance we have put, a person incapacitated by positive statute, will retain his seat, merely because the individual or individuals who petitioned against him, either by neglect or design, did not allege the incapacity in their petition. Perhaps these observations may merit some attention, if it should be thought expedient to make any farther alterations in the statute of 10 Geo. III.

XXVI.

THE
C A S E
OF THE
TOWN and PORT
OF
S E A F O R D,

In the County of SUSSEX.

The Committee was chosen on Friday, the 17th of November, and consisted of the following Gentlemen :

Hon. George Venables Vernon,	Members for	Glamorganshire.
Chairman - - - - -		Perthshire.
Hon. James Murray - - - -		Boston.
Charles Amcotts, Esq. - - -		Warwick.
Hon. Charles Greville - - -		Rutlandshire.
George Bridges Brundenell, Esq.		Leicestershire.
Sir John Palmer, Bart. - - -		Agmondesham.
William Drake, Esq. sen. - - -		Hants.
Sir Henry Paulett St. John, Bart.		Bishop's Castle.
George Clive, Esq. - - - - -		Dorchester.
William Ewer, Esq. - - - - -		Leicestershire.
John Peach Hungerford, Esq. -		Wiltshire.
Ambrose Goddard, Esq. - - -		Grampound.
Richard Aldworth Neville, Esq. -		
NOMINEES,		
<i>Of the Petitioners :</i>		
Sir George Younge, Bart. - -		Honiton.
<i>Of the Sitting Members :</i>		
John Moreton, Esq. - - - - -		Wigan.

PETITIONERS:

Stephen Sayre, Esq. and John Chetwood, Esq.

Sitting Members.

William Hall, Lord Viscount Gage, in the Kingdom of Ireland. George Medley, Esq.

COUNSEL,

For the Petitioners.

Mr. Lee, Mr. Alleyne.

For the Sitting Members.

Mr. Mansfield, Mr. Cox.

THE
C A S E
OF THE
TOWN AND PORT
OF
S E A F O R D.

ON Saturday, the 18th of November, the Committee being met, the petition was read, setting forth; That many persons duly qualified tendered their votes for the petitioners, but were rejected; by which means, on casting up of the poll, there appeared a majority for the sitting members; whereas, if they had not been arbitrarily, partially, and illegally rejected, there would have been a great majority in favour of the petitioners (1).

The last determination of the right of election was then read, and appeared to be entered in the Journals in the following words :

[22]

CASE XXVI.

10 Feb. 1670-1. " Sir Job Charlton reports
 " from the Committee of elections, the state of
 " the case, and evidence, touching the election
 " for the town of Seaford in the county of Suffex,
 " and the question thereupon arising; whether the
 " right of election were in the bailiff, jurors, and
 " freemen only; or, in the populacy; and that the
 " Committee were of opinion, *That the bailiff, jurors,*
 " *and freemen, had not only voices in * election, but that*
 " *the election was in the populacy;* and that Mr.
 " Morley was duly elected.

" The question being put to agree with the
 " Committee—the House divided;

" And it was resolved in the affirmative (1)."
 (Majority 108 to 102).

[23] After this entry had been read, the counsel for
 the sitting members desired that an explanatory re-
 solution made by the House, in 1761, should also
 be read. Those on the other side shewed some re-
 luctance to consent to the reading of the last-men-
 tioned resolution, lest, after it should be read, the
 counsel for the sitting members should insist that
 it was the *last determination*, within the meaning of
 the statute, and thereby endeavour to preclude them
 from impeaching or contradicting it by evidence.

The Committee resolved, That it should be read,

[* The word "*the*" is inter- ted in the printed Journal,
 lined, in this place, in the MSS. and it does not seem material-
 ly to affect the sense.]
 Journal, (which I inspected
 on the occasion of the Com- (1) Journ. vol. ix. p. 200,
 mittee in 1792) thus: " voices col. 2.
 " in * election;" but it is on it-

together

together with the entry of all the proceedings on the occasion, but that its effect and operation should remain open to argument.

The account of those proceedings, in the Journals, is as follows :

10 Dec. 1761. " The House proceeded to the
" hearing of the matter of the several petitions
" (1) complaining of an undue election and
" return for the town of Seaford, in the county of
" Suffex.

" And the counsel were called in,

" And the said petitions were read.

" And the last determination of the House, made [24]
" upon the 10th day of February, 1671, concern-
" ing the right of electing (A) Barons to serve in
" parliament for the town and port of Seaford, in
" the county of Suffex, (whereby it was resolved,
" That the bailiff, jurors, and freemen, had not only
" voices in the election, but that the election was
" in the populacy) was also read.

" And one of the counsel for the petitioners was
" heard, and insisted, That in the said determina-
" tion of the House, the words, "*bailiff, jurors, and*
" *freemen,*" mean such bailiff, jurors, and freemen
" only, as are resident within the said town and
" port; and that the word "*populacy*" means
" inhabitants at large of the town and port of
" Seaford, being masters of families, and not re-
" ceiving alms.

(1) For the petitions, *vide* 17 Nov. 1761.
Journ. vol. xxix. p. 19. col. 1.

" Then one of the counsel for the fitting members was heard.

" And then the counsel on both sides were directed to withdraw.

" They were again called in.

[25] " And the counsel for the petitioners having proposed to produce evidence, in order to shew that the words "*bailiff, jurors, and freemen,*" mentioned in the said determination of the House of the 10th day of February, 1670, mean only such bailiff, jurors, and freemen, as are resident within the said town and port;

" And the counsel for the fitting members having objected to the admission of that evidence, as being contrary to the said determination of the House: And having been heard upon their said objection;

" The counsel for the petitioners were heard in answer thereto.

" And then the counsel on both sides were again directed to withdraw.

" And a motion being made, and the question being put, That the counsel for the petitioners be admitted to give evidence, to shew, That in the said determination of the House, the words "*bailiff, jurors, and freemen,*" mean such [26] " bailiff, jurors, and freemen only, as are resident within the said town and port;

" It passed in the negative."

" And the counsel were again called in,

" And

“ And Mr. Speaker acquainted them with the
 “ said resolution (1).”

11 Dec. 1761. “ The order made this day for
 “ refusing the further hearing of the matter of
 “ the several petitions complaining of an undue
 “ election and return for the town of Seaford, in
 “ the county of Suffex, at half an hour after three
 “ of the clock this afternoon, being read ;

“ The House proceeded to resume the further
 “ hearing of the matter of the said petitions.

“ And the counsel were called in ;

“ And the counsel for the petitioners proceed-
 “ ed in support of their construction of the word
 “ “ *populacy* ” in the last determination of the
 “ House, concerning the right of electing Barons
 “ to serve in Parliament for the town and port of
 “ Seaford aforesaid, made the 10th day of February, [27]
 “ 1670.

“ Then the said counsel examined several wit-
 “ nesses, in order to prove that the inhabitants at
 “ large have, by usage, voted at elections of
 “ Barons to serve in Parliament for the said town
 “ and port.

“ Then the original poll taken at the election of
 “ Barons to serve in Parliament for the said town
 “ and port, in the year 1747, was produced by the
 “ town clerk of the said town and port.

“ And the counsel for the petitioners having of-
 “ fered to produce the corporation-book, in which
 “ are entered the acts of the said corporation ;

(1) Journ. vol. xxix. p. 83. col. 1, 2.

“ And the counsel for the sitting members having objected to the producing of the said book as evidence, in relation to any other matter than the acts of the said corporation ;

“ The counsel for the petitioners were heard, in answer to the said objection ;

“ And the counsel for the sitting members being heard, by way of reply ;

[28] “ The counsel on both sides were directed to withdraw.

“ They were again called in.

“ And the counsel for the petitioners not insisting on producing the said corporation-book ;

“ Several parts of the said original poll were read :

“ And then the counsel on both sides were again directed to withdraw (1).”

The further hearing of the cause was again adjourned till Tuesday, the 15th of December.

15 Dec. 1761. “ The House proceeded to the further hearing of the matter of the several petitions, complaining of an undue election and return for the town of Seaford, in the county of Suffex.

“ And the counsel for the petitioners having gone through his evidence, in support of his construction of the word “ *populacy*,” in the last
[29] “ determination of the House, concerning the right of electing Barons to serve in Parliament

(1) Journ. vol. xxix. p. 84. col. 1, 2.

" for the town and port of Seaford aforesaid, made the 10th day of February 1670;

" The counsel for the sitting members were heard in answer thereto; and insisted, That the word "*populacy*" in the said determination of the House, means, inhabitants, housekeepers, paying scot and lot.

" And the said counsel examined a witness in support of their said construction.

" And the counsel for the petitioners having been heard by way of reply;

" The counsel on both sides were directed to withdraw.

" Resolved, That in the last determination of this House, of the right of election of Barons to serve in Parliament, for the town and port of Seaford, in the county of Sussex, made the 10th day of February, in the year 1670; which is as followeth, viz. " That the bailiff, jurors, and freemen, had not only voices in the election, but that the election was in the populacy;" the word "*populacy*" therein mentioned, extended only to *the inhabitants, housekeepers of the said town and port, paying scot and lot* (1)."

[30]

After these entries from the Journals, the standing order of 16 Jan. 1735-6 was read (2).

The counsel for the petitioners then opened the whole of their case, which consisted of two general points.

(1) Journ. vol. xxix. p. 89. (2) *Supra*, vol. i. p. 99.
col. 2, p. 90. col. 1. 100.

C A S E XXVI.

1. The first was, That the explanatory resolution of 1761, was inconsistent with the true sense of the determination of 1670, which was the *last* determination of the House, when the statute of 2 Geo. II. cap. 24. took place, and therefore final to all intents and purposes; and not to be overturned or altered by any resolution subsequent to the statute.

[31] 2. The second. That, if the Committee should think, agreeably to the resolution of 1761, that the electors distinguished by the word "*populacy*" in the resolution of 1670, must be *scot and lot men*, yet, to bring them within that description, it was not necessary that they should be actually rated to the poor.

The counsel for the sitting members objected to their being permitted to bring evidence to contradict the explanatory resolution of 1761, and this point was separately argued and determined by a special resolution of the Committee.

COUNSEL for the Petitioners.

When a last determination is sufficiently clear, or admits of a construction consonant to general principles, and the common law of Parliament, it would be highly dangerous to allow of explanatory resolutions contradictory to, or inconsistent with, such construction. The certainty and security which the legislature meant to provide by the statute of Geo. II. might be entirely evaded by such pretended explanations. "*Populacy**" is a word of general

[* Dr. Johnson derives the "*lacy*" from the French words "*populace*" and "*popu-* word "*populace*" and defines them

general import; and the fair method of construing it in the determination of 1670, is to apply it to such persons as, by the common law, where there is no charter or prescription to the contrary, are the legal electors for boroughs. These are the inhabitants householders (1). That such is the sense in which the word was understood at Seaford, from the date of the determination in 1670 to the year 1761, can be proved by the constant usage of the place during that long period of time. Indeed the successful party in 1761, and the house in making their decision, seem to have been so strongly impressed with this sense of the word "*populacy*," that even in taking in the qualification of the payment of scot and lot, they added that of being housekeepers. This would have been unnecessary if they had considered Seaford as a common scot and lot borough; for to be a housekeeper is no necessary part of the description of a scot and lot man. Occupancy, even without inhabitancy, is sufficient to constitute that character (2). [33]

If the word "*populacy*" can receive an interpretation agreeable to the common law right of

them to mean "the vulgar; " nato della feccia del *popo-*
" the common people; the " *lazzo* di Roma." Bocc.
" multitude." The French Decameron. Giorn. 10. N° 8.]

word may either have been (1) *Vide supra*, vol. i. Case
formed directly from the Latin of Pontefract, vol. ii. Case of
" *populatio*, which might import Poole.

" *inhabitants*," or from the Italian (2) *Vide supra*, vol. i. p. 352.
" *popolazzo*," which means Case of Dorchester.
" the vulgar." " Io non son

election,

election, if the usage of Seaford for a whole century shows that it was so understood in the borough, an explanatory decision *of the old judicature* construing the term otherwise, so far from being considered as conclusive, will be thought to deserve very little regard from this committee.—The History of the Case of 1761 is recent, and it is well known to have been a very flagrant instance of the influence of the minister of that day.

COUNSEL *for the Sitting Members.*

[34] When a word of doubtful sense (which “populacy” (B) seems to be admitted to be) is employed in a last determination, and the House, whose province it is to explain its own decisions, makes an interpretation of such ambiguous word in plain unequivocal language, the interpretation ought to be conclusive: It forms, as it were, part of the last determination, and is to be considered as something equivalent to, and substituted in the room of, the former expression. What would the consequence be if a formal, explicit, and distinct, explanation by the House of Commons, of an acknowledged ambiguity in a last determination, were to be considered as of no authority, but to remain liable to fresh discussion and inquiry? Would not an opportunity be given, at every new election, of contending for a new meaning to be put on the doubtful expression? and, with regard to the right of election in such a case, would it not remain for ever exposed to the uncertainty, and
subject

subject to the litigation, which the legislature, by the statute of Geo. II. was so anxious to prevent?

If any use could be made on the present occasion, of the common law right of election, the counsel for the petitioners have no right to assume it to be as they contend. The diversity of systems on that head is well known, and the opinion of that great lawyer Lord Chief Justice Holt was very different from that which they would have the Committee to adopt (1).

[35]

If the resolution of 1761 is to be considered as making part of the same determination with that of 1670, what the usage of the borough may have been is of no consequence, and all evidence on that subject is inadmissible.

After the counsel had finished their arguments on this point, the Court being cleared, the Committee deliberated for several hours, and then adjourned till Monday.

On Monday, the 20th of November, after deliberating again for some time, the following question was put:

“ That the Committee do permit the counsel
“ for the petitioners to produce evidence to call
“ in question the resolution of the House of Com-
“ mons in 1761, touching the right of election
“ for the town and port of Seaford, by which reso-

(1) *Vide* Case of Pontefract; *supra*, vol. i.

“ lution

" lution the right of voting in the said town and
 " port, as in the *populacy*, is declared to extend
 " only to the inhabitants housekeepers of the said
 " town and port, paying scot and lot, there having
 " been a previous resolution touching the right of
 " election made in 1670."

And it was resolved in the negative.

On which the counsel being called in, the Chairman acquainted them that the Committee had resolved,

" That the council should not be permitted to
 " call evidence to contradict the resolution of
 " 1761 (C)."*

2. The

* [A like resolution was come to by the Committee which sat in Feb. 1786. *Vide* 3 Lud. p. 56.

It was taken for granted, in 1761, that the words of the resolution of 10th Feb. 1670, (*supra* p. 22.) meant to declare a *concurrent* right in the corporators. This is evident from the proceedings on the latter occasion relative to the interpretation of the words descriptive of the corporators. The same concurrent right was also assumed by the contending parties in 1786. (*Vide* that case in 3. Lud.) But there was no express determination of the point in 1761 within the mean-

ing of 2 Geo. 2. c. 24. Accordingly, in 1792, the counsel for the petitioners (Mr. Pig-gott and myself) contended, that the question was still open, and that the true meaning of the resolution of 1670-1, was, " that the right is in the *populacy*," (since explained to mean, inhabitants paying scot and lot) to the exclusion of such of the corporators, or " bailiff, jurors, and freemen," as are not inhabitants householders paying scot and lot : That this was clear ; 1. from the state of the case in 1670-1, for that two different rights, and each exclusive of the other, were set up at that time, and that

2. The counsel for the petitioners proceeded to the second point, and contended, that it is not necessary that persons, in order to answer the description

that the resolution merely recited *verbatim* the proposition expressive of the exclusive right as assumed by the corporation, in order to negative it, and then proceeded in like manner to recite and affirm substantively the other right; 2. Because the language of that second branch of the resolution of 1670-1, contains a positive and entire proposition, viz. "*That the election was in the populary,*" and does not say "The populary had a right to vote," or "But also in the populary;" 3. From the constitution of Seaford: That it would appear by evidence that this place sent members to Parliament in Ed. Ist's time, and was restored in 1640 to "*its ancient privileges*;" that it was first incorporated in the reign of Hen. VIII. by a charter which says nothing of the right of election. That the case in 1670 was rested upon the ground of usage merely, which usage must be taken to have been the same from the time of Ed. I. downwards. That there-

fore the corporators, who had no existence at that time, could as little have a concurrent as the exclusive right.—The counsel for the sitting members objected to the admission of the evidence on this point, but the Committee determined that it should be received, and the result was that the claim of the corporation was disallowed.

Statements were delivered in on behalf of the contending parties under 28 Geo. 3. c. 52, § 25. That for the petitioners was,

"That the right of election
"for the town and port of
"Seaford, according as was
"decided by the last determination in the House of
"Commons on the 10th of
"Feb. 1670-1, is "*In the populary,*" or, according to
"the interpretation of the word
"*populary*" by the resolution
"of the said House on the 15th
"of Dec. 1761," in the inhabitants householders of the
"said town and port paying
"scot and lot; and in such inhabitants householders only."

The

description of scot and lot men, should actually be rated to, and pay, the poor-tax.

It appeared, by the original poll, that the votes admitted by the returning officer were as follows ;
viz.

For Lord Gage	- - - - -	29
For Mr. Medley	- - - - -	27
For the petitioners	- - - - -	1

[37] But it was proved by John Cæsar, who had acted as check-clerk for Sayre and Chetwood, that 47 persons, a list of whom he produced, who tendered their votes for the petitioners, were rejected because their names did not appear on the last poor-rate, according to which the returning officer took the poll. It appeared, also, that three others tendered their votes, and were rejected, after Cæsar had left the place of polling.

COUNSEL for the Petitioners.

Though it is convenient that, in common cases, the poor rate should be the criterion to fix who

The statement for the sitting " lot," as explained by the members was, " resolution of the House of

" That the right of election " 15 Dec. 1761."

" is in the bailiff, jurats, and The Committee affirmed the
" freemen, and in the popu- statement on behalf of the pe-
" lacy, according to the last tioners, and of course nega-
" determination of the House tivated the other, and reported
" of the 10th of Feb. 1670-1, their judgment to the House
" by which word " populacy" according to the direction of
" are meant " inhabitants the statute. *Vide Journals,*
" householders paying scot and vol. xlvii. p. 564, col. 1.]

are to be considered as paying scot and lot, yet that the rate and payment of the parochial tax for the poor, is no necessary ingredient in the description, or a condition *sine qua non*, is most evident from this, that "*scot and lot*" were known to the law of England long before the poor-tax had any existence. That tax took its rise in the 43d year of Queen Elizabeth, and we find scot and lot mentioned at the time of the Conquest, as having [38] existed among the Saxons, the words themselves being of Saxon or Gothic origin. The expression of "*scot and lot*" is found also in many ancient statutes, and particularly in some, near, but before, the time when the first poor-laws were made. "*Scot*," "*scottuni*," "*scotta*," and "*scottus*," are terms which occur frequently in Doomsday book (1). The recital of the statute of 33 Hen. VIII. cap. 9. sets forth, that the citizens and freemen of London were (at that time) sworn to bear *scot* and *lot*. This clearly proves that those terms had a distinct definite meaning at that period, which necessarily must have been different from a tax not known till some years afterwards. Spelman understands by "*scot and lot*" in the laws of William I. public contributions, taxes, or tallages, in general. He cites the following passage in those laws: "*Omnis Francigena, qui tempore Edwardi propinqui nostri fuit in Anglia particeps consuetudinum Anglorum, quod dicunt an. Plot & an scote persolvatur secun-*" [39]

(1) Spelman, title *scot* and *scottuni*.

"*dum legem Anglorum.*" "*Hoc est*" (says he) *ut omnes Francigenæ, etiam triumphatis jam Anglis, easdem sortēs, easdem solutiones præstarent quibuscunque tenerentur tempore Edwardi Confessoris—Lot autem sortis.*" And he adds, "*Nec obsolevit hodie omnino antiquum illud adagium, nam qui pari sorte, pariterque licet non æqualibus portionibus, in aliquam veniant contributionem dicuntur sæpius juxta scot & lot perolvere.*"

In like manner, under "*title, Lot,*" in the same author, that word is defined, "*Pars tributi sive solutionis alicujus quam inter alios quis tenetur præstare.*"

Franciscus Junius, in his *Etymologicum Anglicanum*, explains "*scot*" (or "*shot,*" these being synonymous words) thus: *Census, Vectigal, Tributum. Item, symbola vel symbolum, i. e. portio quod singuli conferunt in sumptus qui publice in hanc illamve rem faciendi sunt.*"

[40] Analogous to this general sense of the word, "*shot*" is to this day a familiar expression, particularly in the North of England, for the share every man pays of the reckoning at a tavern.

It appears from the two learned authors just cited, that, anciently, whoever in general paid his share of any contribution, was said to pay scot and lot. Spelman, who wrote in the reign of James I. and Car. I. does not say a word of the expression being appropriated or confined to the payment of the poor's-rate, which he most probably would

would have done, if it had been understood in that limited sense in his time.

In short, the phrase of paying scot and lot, seems to have been used to describe persons who were not distinguished by any particular rank or character, but who were sufficiently independent to be able to pay their proportion of any general tax. Thus, in *Magna Charta*, when the King says, "And for this our gift and grant, &c. the Archbishops, Bishops, Abbots, Priors, Earls, [41] "Barons, Knights, Freeholders, and other our subjects, have given unto us the fifteenth part of "all their moveables (1)." "Other our subjects," were those who did not come under any of the higher classes there enumerated, but who were payers of scot and lot.

Watch and Ward was a general duty, to which, by the old statutes, the inhabitants of towns and boroughs were liable in their turns. See the statute of 13 Ed. I. stat. 2. cap. 4. and the case of Stretton and Browne in Cro. Eliz. p. 204. By the statute of 5 Hen. IV. cap. 3. it is particularly provided, "that watch shall be kept on the sea-coast, "in the manner as was wont to be done in times "past." It will be proved, that, in time of war, this practice is still continued at Seaford; and that, during the last war, persons in like circumstances with those who have been kept off the rate, and whose votes were rejected, performed that

(1) Magn. Ch. cap. 37.

duty. The usage is, according to the ancient law, to watch by lot, each man taking his turn. This therefore is as good a criterion of a scot and lot man as the payment of the poor-rate (D).

Enough has surely been said, at least, to shew that, if there has been irregularity, partiality, and misconduct in making the rate, the payment of the poor-tax not being essential to the idea of scot and lot, other circumstances may be inquired into, and that, if upon inquiry it shall appear in the present case, that the persons omitted in the rate were as capable of paying the parochial taxes as those actually rated, the Committee ought to consider them as scot and lot men, and to allow their votes.

The amount of the evidence to shew that the rates were irregularly and partially made, was as follows :

The corporation of Seaford consists of a bailiff, four jurats (or jurors, as they are called in the determination of 1670) of whom the bailiff is one, and an indefinite number of freemen. The jurats are chosen for life, and by their office are justices of the peace for the borough.

[43] It appeared by the testimony of several persons who had served as overseers of the poor, that they had not come into the office by a regular warrant of appointment, under the hands and seals of two or more of the justices, according to the directions
of

of the statute of Queen Elizabeth (1), but that the jurats had sent them the books of rates, and the overplus parish-money, and told them, they were to be the overseers for the year. That, in consequence of this, they had taken the character upon them, and acted as overseers. In 1761 after the election, many persons who had claimed to vote at that election, were rated. Afterwards they were put off the rate. They had applied to the jurats and churchwardens in 1762, and in 1767, and 1768, before the general election, to be put on again, declaring that they were able and willing to bear the burthen, and therefore wished to be admitted to the exercise of the privileges to which that would entitle them. In 1762, [44] Harrison, one of the jurats, said, "they would turn out and keep in just whom they pleased;" and, in 1767, the jurats said, "they would rate such as they liked." In 1768, Harrison and the other jurats being particularly applied to by twenty-five persons at a public house, he said, "he should not resolve his mind that night."

In 1774, on Michaelmas-day, which was previous to the election, the persons claiming to be rated applied to the overseers, and by their agent delivered to them a written notice subscribed with their names, intimating, that if they refused to put them on the rate, the court of King's Bench would be moved against them. It appeared that

(1) 43 Eliz. cap. ii. § 1.

[45] there was no new rate made then, but that the churchwardens and overseers had resolved at that time, if they made a rate, not to put the claimants on it. One of them asked Harrison, if they should make a rate; and he said, " They had no call to do it, as they had money in hand;" but neither he, nor any other of the jurats (who were all proved to have been in the interest of the sitting members) said any thing about leaving the claimants out, if a rate should be made; nor did either of the sitting members say any thing to that purpose. Lord Gage was present on Michaelmas-day when the application was made, and the notice delivered. It did not appear that any application had been made by the claimants at any time in the intervening periods *between* the elections, but only on occasion of the rates made *previous to* the general elections of 1768 and 1774. Harrison, the jurat, had advanced money to the overseers on account of the parish; but it appeared to be usual for the parish officers to borrow money on the credit of the rate, for the immediate use of the parish poor, and then to apply the money raised by the subsequent rate to the discharge of the debt.

[46] One Edward Spice, who had voted for the sitting members as a housekeeper paying scot and lot, said, he was overseer in 1772. That then Harrison *ordered* him to make a book (or rate) according to the old one, which he had done. That he ordered him to make no alteration. That, if it had

had been left to himself, there were others who were ready and willing, whom he would have put on, and that he had not put them on, because it was contrary to the directions he had received from Harrison, and the other jurats. He said, Harrison told him, "The fewer hands it is kept in, the better for us."

In the books there were entries of the allowances of the rates by the jurats. Seven rates were produced; 1. To Easter, 1766. 2. To Easter, 1767. 3. To Michaelmas, 1768. 4. To Lady-Day, 1769. 5. To Michaelmas, 1770. 6. To Lady-Day, 1773. 7. From Lady-Day to Lady-Day, 1774. It was admitted that no appeal had been made from any of those rates, particularly not from the last, by which the poll was taken.

Such being the material circumstances that were proved relative to the conduct of the overseers and jurats in making the rates, there was no objection [47] made either on the part of the sitting members, or by the Committee, to the production of evidence concerning the circumstances of the voters, as well those who stood on the poll, as those who had been rejected (1).

A great deal of evidence was, accordingly, brought on those heads which it would be useless to state at large. Edward Spice, whose testimony was most favourable to the case of the petitioners, went through the list of rejected voters, man by

(1) *Vide infra*, Case of Peterborough.

man, and said, with regard to about thirty-two, that he should have rated them in any other place. That he knew of no other reason why they were not rated, but to keep the right of voting in few hands. But he said of all of them, unless about three, that they had no other means of subsistence but their work, as fishermen or day-labourers, and that his rule of judging was, that every man "who *pays his way,*" and who maintains himself and his family, is rateable. This appeared to be the criterion adopted by several other witnesses, who also went through the list, and swore to the rateability of many of the rejected voters. It was proved, that many of those voters had their corn from the farmers considerably under the market-price; but this was shewn to be in consequence of a sort of general usage in that part of the country in favour of labourers, and never considered as a matter of charity. All the rejected voters were proved to be housekeepers. It was also proved that they paid the parish clerk's fee, which is a groat a year from all householders. One William Roberts swore, that persons in *their* situation kept watch during the last war, but he could not say whether any of *them* did. Their houses in general were proved to be worth from forty shillings to three or four pounds a year. Roberts said, he did not know of any property being rated in Seaford under fifty shillings a year; and one Edward Vinall said, he could not say that persons in the circumstances of the rejected voters had ever been rated. He said,
 he

he could remember that, about forty years ago, only one person had relief in the parish.

One William Wood, who had tendered his vote for the petitioners, and was rejected as not on the rate, was declared by all the witnesses to be a housekeeper of very considerable substance.

On the part of the sitting members, one John Rafon was called, who said he lived in the neighbourhood of Seaford, on a farm of Mr. Medley's. That he had a farm at Seaford, and rented, altogether, upwards of 300 l. a year. That he had at different times acted as a parish officer. That he knew many of the voters and claimants, and their situation. Being shown John Cæsar's list, he swore as to 26 out of the 47, that he should not have thought them fit to be rated, if there had been no question of an election. As to 17, he either said he did not know them, or was unacquainted with their circumstances. The remaining 4, he said he should have rated. It was a rule, he said, in that neighbourhood, not to rate persons who live merely by their labour. That at a place called Bourn, where he had been overseer, they rated persons down to 20 shillings a year, when known to be men of substance; but that there they would not rate a labourer, though he should rent a house of 40 shillings a year.

[50]

It appeared, that about 14 of the voters for the sitting members were custom-house officers, or boat-men, by which they got about 30 l. a year. That, exclusive of what they got in that way,

several of them were in worse circumstances than several of the persons who were not rated. It seemed to be admitted, that those who were not custom-house boatmen, were of sufficient substance to be rated.

The rate by which the poll was taken, was proved by the parish clerk to have been regularly published (1).

COUNSEL for the Sitting Members.

[51] *Scot and lot* men are now universally understood to be persons who contribute to the ordinary taxes of the parish; and the payment of the poor-rate is the established criterion, and the only one that can be adopted. The practice of *watch and ward*, as it is directed to be performed by the statutes of Winchester, and of 5 Hen. IV. has long fallen into disuse. If it existed, it could have nothing to do with the payment of scot and lot, being a sort of duty to which men in all situations and circumstances were equally liable; and for which nothing was to be paid. The same observation will apply to the kind of watch performed in time of war, at Seaford, by a local custom (D).

As to the supposed misconduct of the parish-officers in making the rate, why was it not complained of in the regular manner? The law was open to those who thought themselves aggrieved. They should have applied to the overseers, *at the*

(1) 17 Geo. II. cap. 3. § 1.

time when the rate was making. If they had refused to comply with their demand, an appeal lay to the Justices, in their quarter-sessions. Misbehaviour in the Justices, on hearing the appeal, would have been open to punishment, by information, on an application to the court of King's Bench. It is no objection, that the overseers had no regular warrants of appointment; for if persons who take upon them that character, are guilty of misconduct, they are answerable for it; and rates made by them, and acquiesced under, cannot afterwards be invalidated on the ground of irregularity in their appointment. It will be said, perhaps, that it would have been labour lost to appeal to the jurats, since the injury was done by them, the rates being made by their directions; and that this, in substance, would have been an appeal *ab iisdem ad eosdem*; but the law having made them, as local Justices of the Peace, the regular court of appeal, this Committee will not *presume*, that they would have been guilty of criminal partiality and injustice. Besides, the appeal might have been made to the *county* Justices. The statute of 17 Geo. II. (1) enacts, *affirmatively*, [52]
 “ That, in all corporations or franchises who have
 “ have *not* four justices of the peace, it shall and
 “ may be lawful for any person or persons, in any
 “ of the cases where an appeal is given by this act,
 “ to appeal, if he or they shall think fit, to the next
 “ general or quarter sessions of the peace for the [53]

(1) Cap. 38. § 5.

“ county,

“ county, riding, or division, wherein such corporation or franchise is situate,” but it does not therefore follow, that where there *are* four local Justices, the appeal may not be carried to the county sessions (E).

[54] Upon the whole, as the persons who were rejected at the poll because they were not rated, never took the legal course for redress, this would have been a bar to their claim before this Committee, even if they could have shown that their circumstances entitled them to be upon the rate. But the witnesses have proved that, except three, none of them have any means of subsistence but their labour; so that if any accident were to deprive them of that resource, they and their families must come on the parish. It has not been shown, that one of them was ever rated before 1761, before which period, the right of voting not being understood to depend upon the rates, it was clearly the interest of the parish officers to tax them, if they had been fit to be taxed.

The COUNSEL for the Petitioners, in reply,

Denied that an appeal could have been made to the county justices (E); and they said the partiality of the jurats had been clearly proved, so as to evince that an appeal to them would have been nugatory and fruitless. That the rateability of the rejected voters had also been proved, and that the Committee could, and was the only court that

could,

could, give them specific relief, for the injury which had been done them (1).

On Wednesday, the 22d of November, the Committee, by their Chairman, informed the House, that they had determined, [55]

That the two sitting members were duly elected (2).

(1) Case of Weobly cited Case of Peterborough.
supra, vol. ii. p. 399. *Vide infra*, (2) Votes, p. 109.

N O T E S

ON THE CASE OF

S E A F O R D.

Note
(A.)

PAGE 24. (A.) This town and port was originally a member of the port of Hastings. It returned members to Parliament from the time of Edw. I. till 1 Hen. IV. and from that time ceased till 1640-1. Henry VIII. by a charter of the 30th year of his reign, added it to the Cinque Ports. 4 Feb. 1640-1, the House resolved, that Seaford should be restored to its ancient privilege, and that a warrant should issue for a writ for the electing and returning of two *burgesses*. (Journ. vol. ii. p. 78. col. 1.) Afterwards its members came to be called *Barons*, as those of the other Cinque Ports; for which see Spelman's Glossary, Title, *Barones quinque portuum*.

Note
(B.)

P. 33. (B.) In the case of Honiton, 3 Feb. 1710-11, (cited in the case of Peterborough, *infra*.) the word "*populace*" is used both by the parties, and the Committee, as different from "*inhabitants, householders, paying scot and lot*," and synonymous to "*parish wallers*." Journ. vol. xvi. p. 479. col. 2. p. 480. col. 1.

Note
(C.)

P. 36. (C.) In the case of Haslemere, (*supra*, vol. ii. p. 319, &c.) it seemed to be understood both by the parties
and

and the Committee, that the explanatory resolution of 24 April 1755, was conclusive. Its authority was not attempted to be denied on either side. The petitioners only endeavoured to interpret it in a manner which would have been favourable to their cause. Some people entertain an opinion, that a resolution explanatory of a previous determination of the right of election, is itself a last determination within the meaning of the statute, and to be considered as equally unimpeachable with any other last determination. They put this case. Suppose, on occasion of a ~~controverted~~ election for a maiden borough, the question between the parties to be, whether one particular class of men have a right to vote; as, for instance, in this borough of Seaford, suppose the question in 1670 had been merely, whether *the Jurors* had or had not a right to vote, and the Committee and House had resolved, "That the jurors of the town of Seaford have a right to vote for members to serve in Parliament for the said town," this, as far as it went, would have been final since 2 Geo. II. But if, in some subsequent cause, the right of *the freemen* had been disputed, and the House then had resolved, "That not only the jurors, but also the freemen have a right to vote," this second resolution would, with regard to the right of the freemen, have been equally final by the operation of the statute, as the former. In the same manner, there might have been, at different times, resolutions concerning the right of the bailiff, and that of the populace: This, which they hold to be uncontrovertible, shews that there may be several determinations of the House at different times, with regard to the right of voting in the same place, on all of which the statute may attach, so as to render each of them final; the whole together forming, as it were, one general complete determination. Now, if this is true, they argue that it is equally reasonable that if (in a determination purporting to describe all who are entitled to be electors, and on which the statute has attached) one set of electors

Note
(C)

[59]

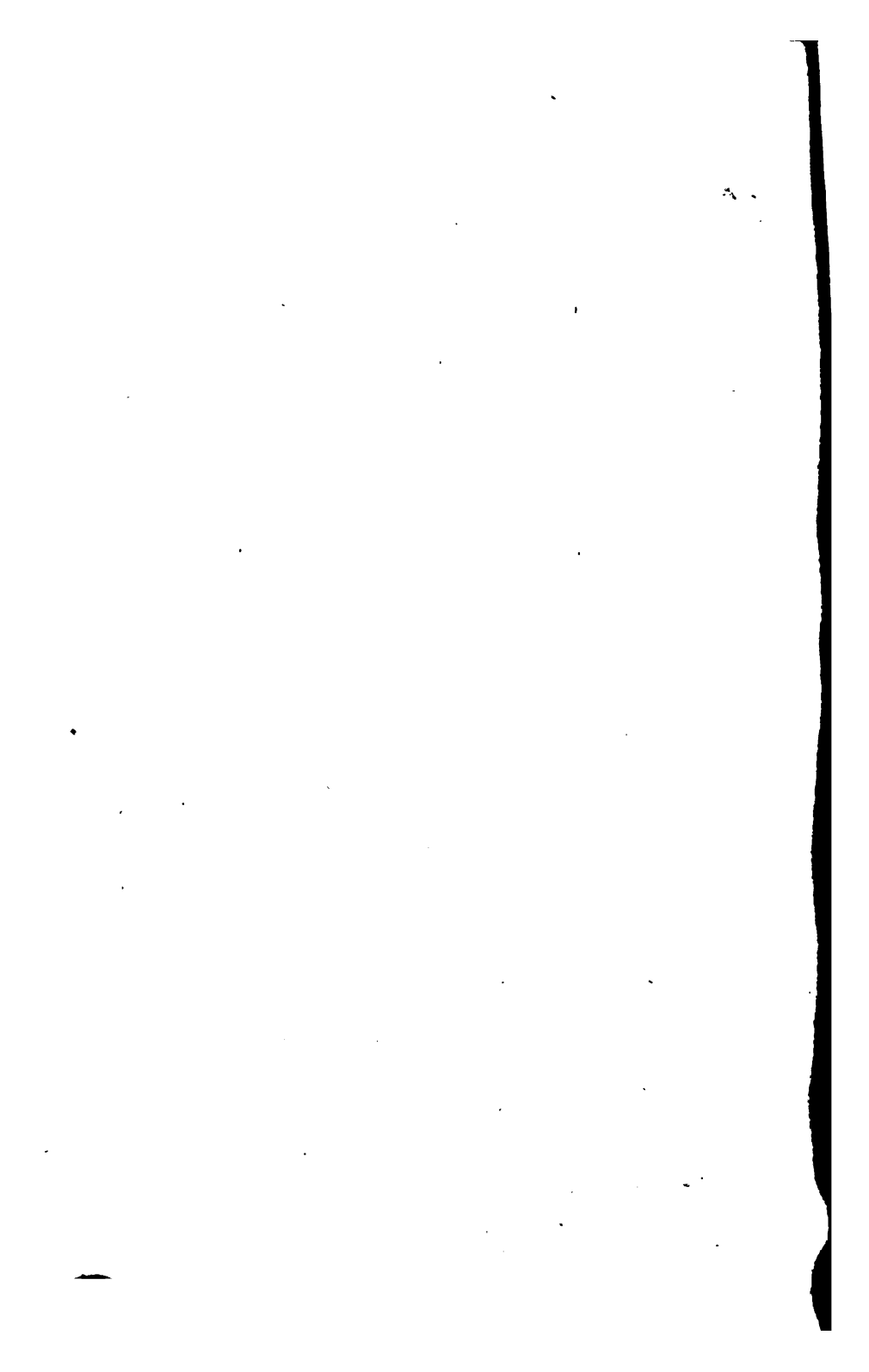
electors are specified in words of a doubtful signification, a new resolution, explaining those words, should be looked upon as final, and forming part of the original determination; for, till it is clearly ascertained what particular class of men was meant, the right of election *quoad* them, is to be considered as not yet determined. There is, however, a manifest difference in the two cases; and perhaps the utmost weight that ought to be given to a resolution explaining words of a last determination, is that which would be given, in Westminster Hall, to the decision of a court of law, interpreting doubtful words in an act of Parliament. Such explanatory decision, if made on due deliberation, and not incongruous or repugnant, would be held to be binding in subsequent cases; and, supposing the act to have been calculated for any particular place, evidence would not be received to show, that, in that place, the words had been understood in a meaning different from that which the court had put upon them. A last determination becomes, by virtue of 2 Geo. II. c. 24., part of that statute, and the positive law of the place; and the House of Commons is a court, and the only court, competent to explain that law. But if, to serve any partial end, the House, in any case, were to begin by voting words of the most unambiguous sense to be doubtful and equivocal, and then were to explain them in a manner repugnant to their obvious and fair signification, such explanatory resolution surely would not, and ought not to be considered as final and binding on Committees, in all subsequent questions relative to that place; which it must be, however unjust and absurd, if the statute were to be held to attach upon it. (*Vide infra*, Case of Cricklade, Note (B.)).

Note
(D.)

P. 42. 51. (D). For the sense of the expression "scot and lot" in resolutions of the House of Commons, *vide* the case of Milborne Port, (Note E.) *supra*, vol. i. p. 140, and the Case of Peterborough, *infra*.

P. 53, 54. (E.) I believe there is no instance of an attempt to appeal from a rate to the *county* sessions, when there have been four or more *local* Justices. Indeed, from a careful perusal of the statutes of 43 Eliz. cap. 2. and 17 Geo. III. cap. 38., it seems that such an appeal could not be allowed. By § 6. of the former, the appeal against a rate is given in general terms, "to the Justices of Peace at their "quarter sessions." But § 8. after giving the same powers as to county Justices to local Justices within their particular jurisdiction, enacts, "That no other Justices shall enter "or meddle there." Then comes the statute of Geo. II. which is more explicit, and (by § 4.) *extends* to a variety of cases and persons, the right of appeal "to the next general "or quarter sessions of the peace for the county, riding, division, *corporation*, or *franchise*, where such parish, town-ship, or place, (for which the rate has been made) lies." If the act had gone no farther, it never could have been supposed that the parties, thereby authorized to complain of a rate made for a parish within a *corporation* or *franchise*, could have appealed to the *county* at large; and, if this is true, the subsequent *proviso* (§ 5.) cannot extend farther than the words express, *viz.* to cases where there are not four local Justices.

[60]



XXVII.

THE

C A S E

Of the CITY of

P E T E R B O R O U G H,

In the County of NORTHAMPTON.

Vol. III.

E

On Tuesday, the 21st of November, which was the day appointed for choosing this Committee (1), the House not being complete, they adjourned to the day following.

On Wednesday, the 22d of November, the Committee was chosen, and consisted of the following Gentlemen :

Right Hon. George Rice, Chairman	} Members for	Carmarthenshire.
John Mayor, Esq. - - - - -		Abingdon.
Thomas Lister, Esq. - - - - -		Clitheroe.
Sir Adam Ferguson, Bart. - - -		Airshire.
William Adam, Esq. - - - - -		Gatton.
Abel Smith, Esq. - - - - -		Aldbor. Yorkshire
Jervoise Clark, Esq. - - - - -		Yarmouth, Hants.
Isaac Martin Rebow, Esq. - - -		Colchester.
Sir George Howard, K. B: - - -		Stamford.
Charles Brett, Esq. - - - - -		Lestwithiel.
John Durand, Esq. - - - - -	} Members for	Plympton.
John Robinson, Esq. - - - - -		Harwich.
Sir Henry Hoghton, Bart. - - -		Preston.
N O M I N E E S,		
<i>Of the Petitioner :</i>		
John Elwes, Esq. - - - - -		Berks.
<i>Of the Sitting Member :</i>		
Lord John Cavendish - - - - -		York.

P E T I T I O N E R :

James Phipps, Esquire.

Sitting Member :

Matthew Wyldbore, Esquire.

C O U N S E L,

For the Petitioner :

Mr. Mansfield, Mr. Hardinge.

For the Sitting Member :

Mr. Lee, Mr. Graham.

(1) Votes, 31 Oct. 1775, p. 30.

THE
C A S E
Of the CITY of
PETERBOROUGH.

ON Thursday, the 23d of November, the Committee being met, the petition of Mr. Phipps was read, containing a charge of bribery against Mr. Wyldbore, the sitting member petitioned against, by himself or agents, and of partiality in favour of Mr. Wyldbore, against the returning officer; and alleging, that legal votes tendered for the petitioner had been rejected, and the suffrages of persons not entitled to vote received for the sitting member (1).

Then the last determination of the right of election in Peterborough was read, and is as follows:

[64]

13 May 1728. Resolved, "That the right of
" electing citizens to serve in Parliament for the

(1) Votes, 31 Oct. 1775, p. 27.

" city of Peterborough, in the county of Northampton, is in the inhabitants within the precincts of the Minster there, being householders, not receiving alms, and in *other* the inhabitants within the said city, paying scot and lot (1)."

Then the standing order of Jan. 1735-6 was read (2).

The counsel for the petitioners abandoned the charge of bribery, so that the only inquiry before the Committee was, Whether Mr. Wyldbore or Mr. Phipps had the majority of legal votes.

The numbers on the poll, as delivered in by the returning officer, were,

For Mr. Wyldbore	- - - - -	219
For Mr. Phipps	- - - - -	212
Majority for Mr. Wyldbore	- - -	<u>7</u>

[65] But the counsel for Mr. Phipps proposed to shew,

1st, That certain persons had been admitted to vote for Wyldbore, because their name stood in the poor-rate made immediately previous to the election, who were fraudulently rated, not being possessed of rateable property, and who therefore were not entitled to vote.

2dly, That persons not *bonâ fide* householders within the precincts of the Minster, had been received as such, to vote for the fitting member.

(1) Journ. vol. xxi. p. 162,
col. 2.

(2) *Supra*. vol. i. p. 92, 100.

3dly, That to be entitled to vote as an inhabitant within the city, though not within the precincts of the Minster, it is necessary to be a *householder*, and that certain persons had been admitted on the poll for the sitting member, who were not householders.

4thly, That several persons possessed of rateable property, and who had applied to be rated, and were refused by the parish officers, had tendered their votes for the petitioner, and had been rejected; and that their votes ought to be allowed [66] by the Committee.

Before they entered on these particular heads, they began by producing evidence to shew partiality in the parish officers, and fraud and irregularity in making the rate of 16 September, 1774, according to which the poll was taken; and partiality in the Justices, on an appeal from the rate to the Quarter-Sessions for Peterborough.

The facts proved on this head were as follows:

There are at Peterborough three churchwardens and three overseers of the poor chosen annually, and four corporation Justices*."

E 3

The

[* After the publication of the first edition of this work, the following note was transmitted to me by a person familiarly acquainted with the constitution of Peterborough.

" There is a mistake in this part of the case," (referring to the above passage) " owing to the counsel at the hearing not explaining the nature of the jurisdiction of the liberty of Peterborough, which comprehends 32 towns, of which the city of Peter-

The churchwardens of 1774 were William Elger, Samuel Stevens, and Robert Mugglestone. They had all served the office before (A).

The overseers were, Bryan Betham, an *apothecary*, Isaac Strong, *attorney*, and William Hetherington. They two had served before (A).

[67] Of the four Justices, the Dean of Peterborough, and William Strong, brother to Strong the overseer, and — Blake, were active friends of Mr. Wyldbore.—The Dean of Peterborough, the two Stronges, Blake, Elger, Mugglestone, Betham, and Hetherington, canvassed the town with Wyldbore, in July and September, 1774. (On the first canvas it was not known that Phipps would be a candidate.) It did not appear that any of the above mentioned persons ever asked any votes for

Peterborough is one. There is a *Custos Rotulorum* for the said liberty. The justices are appointed for the liberty at large, by commissions from the King, in the same manner and form as those at the Old Bailey; and they act by virtue of commissions of the Peace, of Oyer and Terminer, and of Gaol Delivery, by which two last commissions they are empowered to take cognizance of, and to try all crimes whatsoever committed within the liberty. There are a great number of justices in the commissions, and, besides

the four mentioned by Mr. Douglas, there are two or three others who usually act, though only those four were present at the quarter sessions in question. —The counsel at the hearing not being sufficiently explicit, led Mr. Douglas into the error of stating Peterborough as a *corporation*, and as having only four *corporation*, or *local* justices. Upon this error are founded several arguments made use of by the counsel in favour of the petition, relative to the appeal, as made *ab eodem ad eundem*," &c.]

Wyldbore. Isaac Strong was his steward, and had paid his rates to the parish officers on former occasions. All the parish officers of 1774 were substantial householders.

The rates are usually made at Peterborough two or three times a year, according as the money is wanted. The practice had been to make them in open vestry, where all the parishioners who pleased might attend, for which purpose notice used to be given by the parish clerk after the evening service, on the Sunday previous to the day for making the rate. But in 1768, before the general election, a private rate was made by the then parish officers, without the usual notice, or the presence of the parishioners. The expression of one of the witnesses was, "That this method *originated* on that occasion." After that time the former method was renewed, and continued till September, 1774, when the rate, according to which the poll at the last election was taken, was made privately, in the same manner as in 1768. Before the election in 1768 a number of persons, who had never applied till then, assembled, and desired to be put on the rate. The same thing happened in January, 1774, but it did not appear that there was any riot on either of those occasions. Since the last election the rates have continued to be made in private, as those of 1768, and September, 1774. The overseers took the opinion of counsel in 1774 before they made the private rate, and were advised

C A S E XXVII.

that it would be perfectly legal. It was *allowed* by the Dean of Peterborough, and Mr. Blake.

[69] On the 26th of September, 1774, the following notice of appeal to the Quarter Sessions by Armstead Parker, Esquire, and Thomas Warriner, two parishioners, was served on the parish officers.

“ To the churchwardens and overseers of the
 “ poor of the parish of St. John Baptist, in the
 “ city of Peterborough, in the Soke of Peterbo-
 “ rough, and county of Northampton, and to
 “ all and every of them jointly and separately.

“ Take notice that we whose names are hereunto
 “ subscribed, inhabitants of and in the said parish
 “ of St. John Baptist, do intend to appeal at the
 “ next general Quarter Sessions of the peace, to
 “ be holden in and for the said Soke, in Peter-
 “ borough aforesaid, concerning our being aggrieved
 “ by the late rate or assessment made by you, or
 “ some of you, for the relief of the poor of the
 “ said parish, and allowed by two Justices of the
 “ peace in and for the said Soke. And we do
 [70] “ give this further notice, that we, finding our-
 “ selves aggrieved by the said rate or assessment,
 “ have material objections to *several persons* being
 “ left out of the same, and to the sums charged
 “ on several persons therein; and that we find
 “ ourselves aggrieved by the neglect of you the
 “ said churchwardens or overseers, or some of you;
 “ and also by his majesty's Justices of the peace
 “ in and for the said Soke, concerning the making
 “ and

“ and allowing the said rate or assessment. And
 “ we do require you to produce the same at the
 “ hearing of the said appeal, and all and every
 “ the other rates and assessments, by you, or any
 “ of you, made for the relief of the poor of the
 “ said parish; and also all and every other rates
 “ or assessments at any time or times heretofore
 “ made for the relief of the poor of the said
 “ parish, and now in your, or any of your custody
 “ or power, and all the books of entries of meetings
 “ for the making orders and rates touching and
 “ concerning the relief and ordering of the poor
 “ of the said parish. Dated the 26th day of Sep-
 “ tember, 1774.”

[71]

(Signed)

Arm. Parker.

Thomas Warriner,

by P. Descow, his
 Attorney.

The appeal came on to be heard at the Quarter Sessions on the 5th of October, two days before the election, the four Justices attending, and Mr. Blake, one of the two who allowed the rate, being in the chair. An objection was immediately taken by the counsel (1) for the parish officers, to the notice of appeal, on the ground that it did not specify the names of the persons whose omission or insertion in the rate were the objects of complaint. This objection was allowed by the Justices,

(1) Mr. Graham.

after

after hearing counsel on the other side, and they dismissed the appeal.

[72] One Edward Laxton, a person on the rate, said, that in a conversation he had with Hetherington, the overseer, about the private rate, upon his saying, " We have no voice in the election, if the " parish officers make the rate in the manner " they do, and put in and leave out whom they " choose." Hetherington replied, " They *would* " do so, and that they would cram the members " down their throats." He said, he did not understand this to have been said in a jocular way. On his cross-examination it appeared, that the conversation passed after the election, and after Mr. Phipps's first petition had been presented in the former session of Parliament; that there were two or three persons present who were of both parties; and that he (Laxton) had never heard Hetherington, or any other of the parish-officers say any thing purporting that they would make a partial rate, in order to serve the purpose of the election, or any particular candidate.

After this general evidence respecting the rate of 16 Sept. 1774, the counsel for the petitioner proceeded.

[73] Ist Head.] First, To produce evidence to shew that five persons, *viz.* William Bladwyn, William Bowker, John Colls, James Blades, and Thomas Tees, were fraudulently rated for property of which they

they were not the occupiers, and whose votes the Committee ought therefore to strike off the poll.

IIId Head.] Secondly, To disqualify other two voters, *viz.* John Neegers, and Henry Bracken, by shewing that they were not *bond fide* householders within the precincts of the Minster, having voted under that description.

✶ I shall have occasion, in the sequel of the case, to mention why I have not thought it necessary to state the evidence concerning the seven voters just mentioned.

IIIId Head. When the counsel for the petitioner came, on the third head, to prove that certain persons who had voted as inhabitants of the city, without the precincts of the Minster, were not householders, and consequently, as they contended, not entitled to vote by the last determination, the counsel on the other side objected to the hearing of evidence on this subject. [74]

In consequence of this objection, the question, whether it is necessary that such persons should be householders, was argued by all the counsel.

COUNSEL for the Petitioner.

According to the rational unprejudiced construction of the words of the last determination, the qualification of *being householders* extends to the inhabitants without the precincts of the Minster, for the word "*other*" should be understood to be used so as to carry on the qualification specified

fied in the first member of the sentence to the second; although, with regard to the class of voters mentioned *there*, another is added, *viz.* that they must be payers of *scot and lot*.

[75] If, however, the Committee should think this too violent a construction of the words, it will appear from an attentive consideration of the subject that the description of "*an inhabitant paying scot and lot*" necessarily implies, that the person so described should be a *householder*, and that, where the words "*householder*," or "*housekeeper*," are added, it is merely *ex abundanti cauteld*.

"*Paying scot and lot*" is a sort of corrupt abbreviation of the proper ancient expression which was "*paying scot, and BEARING lot*," the term, "*bearing*" having been dropped in this, and many other determinations of the House of Commons, as the word "*paying*" is dropt in a Statute of Henry VIII. where the citizens of London are said "*to BEAR scot and lot* (1)." "*To pay scot*," therefore, is to pay parochial taxes, and "*to bear lot*," to perform parochial duties, and discharge parochial offices. One of the most obvious of these offices is that of an overseer of the poor, and a man who cannot serve as overseer, cannot [76] be considered as one bearing lot in his parish. Now by the statute of Elizabeth (2), none but householders can be overseers. Indeed, it may be said, that this was a new office created by the statute;

(1) 33 Hen. VIII. cap. 9. § 2.

(2) 43 Eliz. cap. 2. § 1.

but it is more probably the same with that of the ancient collectors, to whom new powers were given, the words of the statute requiring them to be householders being only declaratory. If that were not so, still, as all the resolutions and determinations of the House of Commons mentioning "*scot and lot*" are posterior to the reign of Queen Elizabeth, the House must be presumed to have known, that to be an overseer of the poor, which since the statute is a parochial office and duty, and therefore comprehended in the idea of "*bearing lot*," it is necessary that the party should be a householder.

It will be found, by several cases in the Journals, that when the House speaks of inhabitants paying *scot and lot*, they mean *householders*, whether that word be added to the description or not.

In the case of Honiton, 3 Feb. 1710-11, where there was a double return, the Committee of elections reported as follows :

" If the right of election be in the inhabitants, [77]
 " *householders*, paying *scot and lot*, Mr. Shephard
 " is returned duly elected.

" If the right be as well in the populace, as in
 " the inhabitants paying *scot and lot*, Sir Walter
 " Yonge is returned duly elected (1)"

Here, in the first proposition, the word "*householders*," *ex abundanti cautela*, is added ; but, in the second, when the Committee is unquestion-

(1) Journ. vol. xvi. p. 479. col. 2.

ably speaking precisely of the same class of men, it is dropt, and is discontinued through the rest of the report, and likewise in the resolution of the Committee on the right of election, which they thought extended to the potwallers not receiving alms, (a description used in this case as equivalent to *populace* (1)) as well as to the inhabitants paying scot and lot (2). The House thought proper to amend the resolution, by leaving out the words [78] which declared a joint right to be in potwallers not receiving alms, and resolved,

“ That the right of electing members to serve
 “ in Parliament for the borough of Honiton, in
 “ the county of Devon, is in the inhabitants of
 “ the said borough paying scot and lot only (3).”

They adopted, therefore, the first proposition stated to them by the Committee, and must have meant to declare the right of voting to be in the persons, described in that proposition, and not in a set of men concerning whom there was nothing laid before the House, *viz.* inhabitants, paying scot and lot, not householders.

In the case of Tamworth in 1698-9, the House came to the following resolution :

17 March, 1698-9. Resolved, “ That the right
 “ of election of Burgeffes to serve in Parliament
 “ for the borough of Tamworth, is in the inha-

(1) *Vide supra*, Case of Sea- col. 1.
 ford, p. 56. Note (B.)

(3) Journ. vol. xvi. p. 480.

(2) Journ. *loc. cit.* p. 480. col. 1.

“ bitants

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“ bitants paying scot and lot, and in such persons
 “ as have freeholds within the said borough, whe- [79]
 “ ther resident in the said borough or not (1)”

In the case of the same borough in 1722-3, one of the parties contended, “ That the right of
 “ election was in the inhabitants paying scot and
 “ lot, and not receiving alms.”

The other insisted, “ That it was in the inha-
 “ bitants paying scot and lot, and in such free-
 “ holders who have freeholds in the borough,
 “ whether resident in the borough or not ;” agree-
 ably to the former determination.

It appears, by this state of the question be-
 tween the parties, and by the evidence as set
 forth in the report entered in the Journals, that
 the right of the inhabitants paying scot and lot
 was not contested, and that the only matter in
 issue was the right of the freeholders (2). The
 Committee (3), and the House (4), came to the
 following resolution :

23 Jan. 1722-3. Resolved, “ That the right [80]
 “ of election of burgessees to serve in Parliament
 “ for the borough of Tamworth, is in the inha-
 “ bitants *being householders*, paying scot and lot,
 “ and not receiving alms.”

Here the word “ *householders*,” is employed merely
 in the way of explanation. The House must have

(1) Journ. vol. xii. p. 598. col. 2.

col. 2.

(3) *Ibid.*

(2) Journ. vol. xx. p. 100.

(4) *Ibid.* vol. p. 102, col. 1.

held, that the qualification of being a householder was necessarily involved in the idea of an inhabitant paying scot and lot; for, as there was no evidence produced relative to the first class of voters, the words declaring their right in this resolution of 1722-3, must be considered as exactly equivalent in their import to those of the resolution of 1698-9, and to those made use of by both parties in 1722-3, in stating what they contended to be the right of election; and in neither of those instances is the word "*householders*" expressed.

[81] The difference between the cases of Honiton and Tamworth is this: In the first, the word "*householders*," having been employed in stating the right of election in the Committee, it was omitted in the determination. In the second, it was left to be understood, in the state of the question between the parties, and was supplied, in the determination (B).

Indeed the word "*inhabitants*" standing alone, (although in some instances it may admit of a more general interpretation) where expediency and good sense require the exclusion of servants, lodgers, or inmates, ought perhaps to be confined to householders. In common language, when we talk of the inhabitants of a parish, who are meant but those who are permanent householders there? Thus Lord Coke, in his Commentary on the statute of 22 Hen. VIII. cap. 5. concerning the reparation of bridges in highways, expounds "*inhabitants*," (no qualifying

qualifying epithet being superadded) to mean "such as be householders (1)."

If, after all, the sense of the resolution should appear doubtful to the Committee, the usage of the place, if evidence is produced to show the usage, will satisfy them, that it has always been understood at Peterborough, that none but householders can vote, whether living within, or out of, the precincts of the Minster.—The last determination of the right of election in Great Marlow, is as follows :

21 Nov. 1690. Resolved, "That in the borough of Great Marlow, in the county of Bucks, those inhabitants only who *pay scot and lot*, have a right to give voices in the election of burgesses to serve in Parliament for the said borough (2)."

Now supposing the abstract sense of the words to be doubtful, yet, as it is well known, to those who are acquainted with that borough, that the uniform usage has been for none but householders to vote (3), a Committee, on hearing evidence of the usage, would certainly interpret the determination to extend only to householders.

That evidence of usage is to be admitted to explain the meaning of ambiguous expressions in last determinations is not to be questioned, as it is a practice founded in a known rule of law, and established by various precedents of the last session, viz. in the Cases of New Radnor, Dorchester, &c.

(1) 2 Inst. p. 703.

col. 1.

(2) Journ. vol. x. p. 478.

(3) *Quere.*

COUNSEL for the *Sitting Member*.

If the Committee should go into the usage, it would appear that there has been but one contested election for Peterborough since the last determination was made, *viz.* in 1768, and that, upon that occasion, persons voted who were not householders.

But the sense of the words is plain and unequivocal, and, in such cases, it would be highly inconvenient and dangerous to suffer parties, under a pretence of usage, to explain away the obvious import of a last determination. It is contrary to grammatical construction to carry the words "*being householders,*" forward to the second member of [84] the sentence. The meaning of the House was to fix a criterion of the substance and independency of the inhabitants both within, and out of, the precincts of the Minster. Within those precincts there is no parish-rate; and therefore, as to that part of the city, the qualification "*being householders*" was adopted. In the rest of the city, where the parish taxes are paid, the common qualification of paying scot and lot was all that was required.

But it is contended, that the description of inhabitants paying scot and lot, necessarily comprehends the circumstance of "*being householders,*" whether expressed or not. Recourse is had to the phrase of "*bearing lot,*" and an inference is drawn from it, which would prove that no one can vote in a scot and lot borough who is not qualified to be an overseer of the poor. This would exclude

Justices of the Peace, and several other classes of men exempted by law from serving that office, but whose right to vote as scot and lot men has never been called in question (C).

Cases have been cited to shew that, in resolutions of the House of Commons, by "inhabitants paying scot and lot," householders are meant, whether the word "householders" be expressed or not. But what do those cases prove? Only inaccuracy in the reports of Committees of elections, and a dissonance between them, and the determinations of the House consequent upon them. It is impossible to produce an instance where, after there has been a determination of the House, declaring the right of election to be in inhabitants paying scot and lot, the *House* has held that, to come within that description, the voters must be householders. There are numerous instances to the contrary. In the case of Stamford, in 1735-6, the line is distinctly drawn. One of the parties contended,

"That the right of election is in the *householders*,
 "inhabitants within the borough, paying scot and
 "lot there, and not receiving alms or public
 "charities."

The other,

"That the right of election is in the inhabitants
 "paying scot and lot, and not receiving alms or
 "public charity (1)." [86]

(1) Journ. vol. xxii. p. 515. col. 1.

And the Committee, and the House, upon evidence that persons having paid to the poor's rate had always voted, though not householders (1), 8 March, 1735-6, Resolved,

" That the right of election of burgesses to
 " serve in Parliament for the borough of Stamford,
 " in the county of Lincoln, is in *the inhabitants*
 " *paying scot and lot*, and not receiving alms or
 " public charities (B)."

[87] The passage in Lord Coke's second Institute, when taken altogether, is directly against the construction for which it was cited, for although he says that, for the purposes of the statute of 22 Hen. VIII. the inhabitants there meant must be householders, he clearly holds, that the word, in its common legal sense, does not admit of that restriction. "*Ex vi termini*," says he, " every
 " person that dwelleth in any shire, riding, city,
 " or towne corporate, though he hath but a per-
 " sonall residence, yet is he said in law, to be an
 " inhabitant or a dweller there, as servants, &c.
 " But this statute extendeth not to them, but to
 " such as be householders. And this is gathered
 " by the words of the fourth branch of this act
 " that giveth the distresse (2)." Therefore, to
 confine the sense, subsequent restraining words
 were necessary.

Agreeable to this explanation of the word, is what we find in Gateward's case, in Coke's Reports;

(1) Journ. vol. xxii. p. 616. col. 2. (2) 2 Inst. *loc. cit.*¹

for there it is said, on a question, whether the inhabitants of the town of Stixwold could be entitled by custom to a right of common in respect of their inhabitancy, "What estate shall he have
 " who is inhabitant in the common, when it appears he has *no estate or interest in the house*, (but
 " a mere habitation or dwelling) in respect of
 " which he ought to have his common? For
 " none can have interest in common in respect of
 " a house in which he hath no interest (1):" and afterwards, in the same case, "In these words,
 " *inhabitants and residents*," are included tenant in
 " fee-simple, tenant for life, for years, tenant by
 " *elegit*, &c, tenant at will, &c. (and tenancy at
 " will is the lowest interest a *householder* can have
 " in a house) and he who hath no interest, but
 " only his habitancy or dwelling (2)."

[88]

Having finished their arguments on this head, the counsel were directed to withdraw, and being called in again, after the Committee had deliberated for a considerable time, the Chairman said he was directed to inform them of the following resolution:

"The Committee are of opinion, that the word
 " *householders*," in the resolution of the House of
 " Commons, of 13 May, 1728, relates to the
 " *inhabitants within the precincts of the Minster*
 " *only*, and not to other the inhabitants within
 " the said city, paying scot and lot."

[89]

(1) 6 Co. Rep. f. 60.

(2) *Ibid.*

It was observed by the counsel for the petitioner, that the words of this resolution did not expressly exclude them from going into evidence, to show from usage, that the class of voters described by the words "other the inhabitants within the said city" "paying scot and lot," must be householders; upon which the Chairman said, that the Committee had not mentioned any thing to that purpose in their resolution, but that they had fully considered the question, and that, if desired by the counsel, they would come to a special resolution upon it (B).

But this was not insisted upon.

[90] IVth Head.] The counsel for the petitioner now proceeded to the 4th head: but, having called a witness to prove the rateable property of one Thomas Felton, it was insisted, on the part of the sitting member, that the Committee could not receive any evidence on that subject, unless criminal partiality and misconduct were first proved in the parish officers relative to the making of the rate.

They argued as follows:

The rule, that misconduct or criminal* partiality

* [*Vide R. v. Young & Pitts.* 1 Burr. 556. Where the Court of B. R. held, That they had no right to inquire into or over-hale the determinations of Justices in granting ale-house licences, on account of a mere error in judgment, unless there were a ground of partiality, malice, and corruption, in which case they would be liable to prosecution by information, or indictment, or even possibly by action, if the malice were very gross and injurious.]

must

must be proved, before the Committee will think themselves entitled to inquire into the circumstances of persons put on or left out, was laid down in the case of St. Ives, upon legal grounds, stated in the printed report of that case (1). Where misconduct and partiality are first proved, justice requires that the rateability of the voters, or persons who tendered their votes, shall be considered in the Committee. Perhaps it ought to be so, even without a previous proof of misconduct, if the petition has come on to be tried before there has been an opportunity of pursuing the regular redress chalked out by law, against unfair and partial rates, by an appeal to the quarter sessions. Has misbehaviour or partiality been proved in the present case? Or, before this trial came on, has there not been sufficient opportunity to impeach the rate at the quarter sessions?

[91]

As to the conduct of the parish-officers, the evidence produced seems intended as the ground of two heads of accusation. 1. That the overseers and churchwardens were persons who might have excused themselves from serving in their offices (A). 2. That they did not make the rate in open vestry, agreeably to the usual practice. The first circumstance, however, cannot afford a presumption of criminality, unless it had appeared that they were appointed at the instigation of Mr. Wyldbore, or took their offices upon them and made the rate, with a view to influence the election,

(1) *Supra*, vol. ii. p. 395, 396.

But of this there is not the smallest evidence. Indeed, every suspicion of that sort must fall to the ground, when it is considered that, at the time of their appointment, and even when the rate complained of was made, the dissolution of the Parliament, which afterwards took place, could not be foreseen. If the Parliament had subsisted till the expiration of the seven years, there must have been a new appointment of parish-officers, and another rate, before the election.

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To the second objection it is a sufficient answer that, by law, the parish-officers have a right to make a rate in private, to which the concurrence of the parishioners is not at all necessary; as it is to the making a church-rate. Indeed, in this respect, they were so cautious, on occasion of the rate now complained of, that when they found it expedient (on account of the confusion and disturbance apprehended, near the time when the general election approached, if the rate should be made in open vestry) to take the same step which had been necessary in 1768, they would not resolve upon it till they were authorized by the opinion of counsel (D). But, as a private rate is perfectly legal, so it is proved to be attended with no inconvenience at Peterborough, for all the rates since the general election have been made in the same manner, without any complaint having been lodged on that account. (This was proved by the witnesses.)

[93]

It will be said, that the parish-officers and Justices

lices were friends to Wyldbore. This is not denied. As electors they had a right to take part with one candidate in preference to another; but no act of agency has been proved on any of them, not even that, when they accompanied him on his canvass, they ever solicited a single vote. The conversation which Laxton has sworn to, with Hetherington, happened after the election, and when the petition had been presented; and if what he then said had any serious meaning, it must have been, that he thought the sitting member had so good a cause, that however disagreeable it might be to those who were in a different interest, the decision of the Committee, which should be appointed to try the cause, must be in his favour. It is impossible to conceive, that, in a company of persons of both parties, he could have meant to avow that he had concurred in procuring an election contrary to the sense of the borough, by garbling the rate.

[94]

It will be said, that the Justices, at the quarter-sessions, acted partially in dismissing the appeal; but they did not dismiss it till after the objection had been taken, and solemnly argued by counsel on both sides. They dismissed it on the justest grounds, because, as there was no notice of the particular persons whose omission from the rate was objected to, it was impossible that the parish officers should come prepared to make their defence. Besides, what they did was authorized by a decision of the court of King's Bench, in the case

[95] case of the King against the Inhabitants of St. Helen in Abingdon (1) which was cited by the counsel for the parish officers (E). But if the appellants thought there was any grounds for their complaint, why did they not appeal again to the following quarter-sessions? and why have they never appealed against any of the two subsequent rates, which have been in every respect the same with the rate of September, 1774? (¶ This was not denied.)

It will be said, the appeal was to no purpose, being, in effect, *ab eodem ad eundem*. But are we to *presume* that those whom the law has appointed to judge in such cases will act with partiality; or that, because some of them allowed the rate, they will not judge of the merits of it according to the evidence laid before them at the Sessions (F)?

If Justices do act criminally, is not the court of King's Bench open to the persons injured, who may apply for an information against them? Was not an application for that remedy within the power of the appellants in 1774, if they had believed that the dismissal of their appeal amounted to misbehaviour and guilt in the court of quarter-sessions?

[96] As, therefore, the regular mode of relief was open; as there has been time to pursue it, and it has not been done; and as there is no proof of criminality and misconduct in making the rate,

(1) Hill. 27 Geo. II. Bott's Poor's Laws, p. 57, 58.

the Committee will not take upon themselves the character of parish officers, but agreeably to the decision in the case of St. Ives, will refuse to hear evidence of the rateability of Felton, and the other persons whom the counsel for the petitioner propose to qualify as having been entitled to be upon the rate at the time of the election.

COUNSEL for the Petitioner.

The present case differs from that of St. Ives. There, the persons claiming to be put on the poll, had not been rated for several years, and had never before made any complaint on that account; whereas here it will be shewn, that Felton and others, omitted in the rate of September, 1774, were on those immediately preceding, and that their circumstances had not undergone any change to justify their being left out on that occasion.

The position contained in the resolution concerning St. Ives, as it is reported in the printed book (though by the bye, not accurately in the words in which it was delivered by the Chairman (G.)) may perhaps be right. But if it can be shewn that persons possessed of rateable property, for which they had been assessed in the former rates, were left out immediately before an election, is not this evidence of misconduct in those who made the rate? Is not what has been already proved respecting the parish officers, such evidence of partiality and misconduct as should induce the Committee to think themselves obliged to go into the

[97]

the merits of the rate? If the doctrine of the case of *St. Ives* is understood to be, That the rate is not to be gone into, unless such evidence is first laid before the Committee, as the court of King's Bench would require, before they would grant an information, it is false, and unsupported by principles, either of law or justice.

[98] The circumstance of the parish officers having been volunteers, who took upon them, unnecessarily (A), a duty which is generally thought burthenfome, certainly furnishes a presumption that they did so to serve election purposes. This presumption gains strength when it is considered that, on the canvass, they appeared as the avowed partizans of Mr. Wyldbore. It was said, that, as the dissolution of the Parliament was not known when they were appointed, nor when they made the rate, there could be no view in their appointment, and in the rate, to the election. But it will be observed, that if the last Parliament had died a natural death, the general election must have come on some time in 1775, and the rate complained of was made near the end of the year preceding.

* Can any thing afford a stronger ground for presuming fraud and occasionality in making the rate, than the innovation of not holding a vestry for that purpose, which, as one of the witnesses swore, *originated* in 1768, and was laid aside from that year till 1774; because in this interval of time there were no election purposes to serve. There is,

is, perhaps, no express provision in any statute against rates made without the concurrence or privacy of the parish, but the preamble to 17 Geo. II.* cap. 3. shews that such private rates are highly disapproved of by the legislature, and even considered as contrary to the true intent and meaning of the 43d of Elizabeth. The words are, "Whereas
 " great inconveniences do often arise in cities,
 " towns corporate, parishes, townships, and places,
 " by reason of the unlimited power of the church-
 " wardens and overseers of the poor, who fre-
 " quently, on frivolous pretences, and for private
 " ends, make unjust and illegal rates, *in a private*
 " *and clandestine manner*, contrary to the true in-
 " tent and meaning of a statute made in the 43d
 " year of the reign of Queen Elizabeth, intituled,
 " An Act for the better relief of the poor." Are
 not these words declaratory of the spirit of the sta-
 tute of Elizabeth, and a proof that private rates
 are contrary to the intention of the legislature (D)?
 Is a rate of that sort, made on the eve of an elec-
 tion, in a place where the constant practice has
 been to hold a vestry for that purpose, and by of-
 ficers the avowed adherents of one of the candi-
 dates, is such a rate to be considered by the Com-
 mittee as fair, and unimpeachable? Is it so bind-
 ing as to preclude the Committee from inquiring
 into the rateability of persons who voted, or claim-
 ed to vote? The rate, when fair and unimpeached,
 may be a true and sufficient measure of the ratea-
 bility. Where there has been reason to suspect it

[100]

as garbled and fraudulent, the House, and the Committee of elections, have, upon former occasions, considered it no longer as a criterion. They have examined into the rateability of the claimants, and when found to be possessed of rateable property, have allowed their votes. In the case of Newark, the right of the House to enquire into the rateability of scot and lot voters, was so far from being questioned, that it is expressly recognized in the last determination of the right of election.

[101] 11 Jan. 1699-1700. Resolved, " That the
 " mayor, aldermen, and all the inhabitants within
 " the borough of Newark upon Trent, in the
 " county of Nottingham, who pay, or *ought to*
 " *pay*, scot and lot, within the said borough, have
 " a right to vote at the election of members to
 " serve in Parliament for the said borough (1)*.

In

(1) Journ. vol. xiii. p. 111, col. 2.

[* This resolution seems to have been framed entirely on the words of the charter of 7 Car. II. by which the right of electing representatives was first granted to this borough. (Vide *supra*, Introduction, Note (C.) p. 3.). The words of the charter are—" Quod bene liceat et licebet, majori et aldermannis burgi prædicti, et successoribus suis, et omnibus

inhabitantibus burgi seu villæ prædictæ pro tempore existentibus qui lott et scott in burgo sive villâ prædictâ solvunt et contribuunt, solvent et contribuent, aut solvere et contribuire debent vel debebunt, eligere et nominare de tempore in tempus duos discretos viros burgi prædicti fore et esse burgenses pro burgo illo." But, for the construction which has been put upon the words both of the resolution and charter.

In like manner, in the case of Milborne Port, which happened last year, the Committee went largely into the rateability of the different voters; because there had been great irregularity in the appointment of the overseers. Nay, *this* very Committee has allowed the petitioner to question the rateability of persons *on* the rate. If faults of *commission* in the rate are cognizable here, there can be no reason why faults of *omission* should not be so likewise.

But we are told, that the proper jurisdiction for trying the rate, was the quarter sessions; That, though the first appeal was quashed for a defect in the form of the notice, a new one might have been brought to the next sessions, or that the two subsequent rates might have been appealed against; [102] That if, on the trial of any of those appeals, the magistrates had refused to do justice, they might have been proceeded against in the court of King's Bench; That, as none of these steps have been taken, the parties are concluded, and are to be considered virtually to have acquiesced in, and submitted to, the rate. But, will the Committee adopt this reasoning? To what purpose was it to appeal to Judges known to be interested in confirming the rate (F)? The objection taken to the notice, was an excellent expedient to save *them* from the shame of deciding against the mé-

charter, (in consequence of of a Committee reported to statements under 28 Geo. III. the House, and now become c. 52. § 25.) by the judgment final, *Vide* 1 Fras. p 314.]

rits,

rits, for surely they could not believe, that the officers were really ignorant who were the objects of the appeal. If the Justices were in truth of opinion, that the notice was not sufficient, it was their duty to adjourn the appeal, and thereby give time to set right the mistake; for the statute of 17 Geo. II. cap. 38, enacts, "That if it shall appear to the Justices, that *reasonable notice* was not given, then [103] "they shall adjourn the appeal to the next quarter sessions (1)."

But say they, Why not appeal to the court of quarter sessions, held next after that which dismissed the first appeal? The answer is this; It is very doubtful whether that was in their power. An appeal, under the statute last mentioned, must clearly be to the sessions next immediately after the making the rate, and if an appeal against a rate might, by the statute of 43 Eliz. have been made generally to any sessions, the 4th section of 17 Geo. II. cap. 38. which was meant to correct and explain the former enactment on this subject, seems also to limit the time within which *every* appeal from a rate must be brought. This is the more probable, because, in other cases of appeals, under the poor laws, *viz.* from orders of removal, the same limitation is established (2). But the parties well knew, that an appeal to the Justices of Peterborough, was to no purpose. They knew [104] that if they had sued for, and obtained, an infor-

(1) § 4.

(2) 3 William and Mary, cap. 11. § 10.

mation against them, in the court of King's Bench, the specific relief which they required, could not have been obtained there. That court could not have granted a *mandamus* for putting those on the rate, who had been left off. They reserved their complaint, therefore, for this tribunal, knowing, that every preliminary or collateral question necessary to lead to a decision of the merits of the election, is within the jurisdiction of the Committee, though there should be other judicatures for the direct trial of such questions. This rule was recognized in the case of North Berwick. An argument used on that occasion will apply here. By the statute of 16 Geo. II. cap. 11. § 24. none but magistrates and counsellors, or constituent members of any meeting for, or previous to, the election of magistrates or counsellors for a royal borough in Scotland, are empowered to complain to the Court of Session, of any wrong done at such election (1). The magistrates and counsellors elect the delegate, and the delegates for each district elect the member. It was, therefore, contended, that the Committee were particularly bound to entertain the complaint of the candidate, or of the constituent members of the other boroughs of the district, concerning the election of the magistrates of Jedburgh, who had chosen the delegate for that place (2). It was said, that they were materially interested, and yet could not be heard

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(1) *Supra*, vol. ii. p. 445.(2) *Ibid.* 456, 457.

in the inferior court. For the same reason, the Committee here ought to entertain Mr. Phipps's complaint of an unfair rate, for *he* could not have gone to the sessions, as a person aggrieved by the leaving out of men who should have been on the rate; especially as the first sessions immediately after the rate (to which alone, perhaps, the appeal could have been brought) happened before the election. They ought to hear his objections, as

[106] complaining in the name of the persons left out of the rate; since it would seem, that even *they* could not have complained to the sessions. They were thereby delivered from a burthen, and therefore could not appeal for relief as persons aggrieved. Indeed, it is easy to see, that cases may frequently arise, where, by a partial rate, persons may be greatly injured *as electors*, and yet cannot be said to be aggrieved, considered merely with a view to the payment of the poor-tax; which, however, is the proper, perhaps the only object of the jurisdiction of the sessions, on an appeal from a rate. Thus, if persons are put on who ought not to be rated, and they are satisfied; others, who are also in the rate, cannot say they are aggrieved, because the same burthen is shared with a greater number of people; and, in the case just put, if those on the rate do not complain for being charged alone, with what ought to be divided among them and those left out, the latter cannot say they are injured. But they may say, at *the election*, the merits of which, it is the
peculiar

peculiar province of the Committee to determine, that they have been injured by being left unrated, with a view to rob them of the franchise of voting. So may those entitled to be on the rate, and to vote, say they are injured, if others, not entitled to be rated, are put on in order to give them votes, and to overwhelm, by their means, the suffrages of the legal electors.

Upon the whole—It is clear, from principle and authority, that rateability may be enquired into in the Committee: That, though a fair rate may be a true and sufficient measure of rateability, and to be rated, when the rate is liable to no suspicion, a satisfactory criterion of the right to vote in scot and lot boroughs; yet, when there is reason to suspect the rate, the more troublesome but more certain standard of rateability should be resorted to: And that, although there is another jurisdiction for examining the justice and validity of rates, yet the Committees of elections, so far from being thereby precluded from going into the same enquiry, are bound to enter upon it in a variety of cases. The present case particularly calls on the Committee to take such an enquiry upon them; for, the conduct of the returning officers must render the rate suspicious, and the conduct of the Justices must show, that a new appeal to them would have been fruitless and vain. [108]

When the circumstances of Felton's property are laid before the Committee, they will see still greater reason to reject the rate of September,

1774, and to decide merely according to the rateability of the persons who, by the partiality of the parish officers, were denied the benefit of that usual evidence of their right to vote.

COUNSEL *for the Sitting Member, in reply.*

[109] The case of Milborne Port differs widely from this. There, each party had appointed a sett of overseers, and each sett made a different rate. To decide between them, it was absolutely necessary that the rateability should be taken into the account. Still, however, the Committee required that the voters should be persons who had been rated *de facto*.

In the case of Newark, the right of election, as declared by the resolution, is exactly what both parties admitted to be prescribed by the charter of Car. II. making Newark a parliamentary borough. Can *that* have any influence with regard to other boroughs? Where is the resolution which says, that in general in scot and lot boroughs, persons rateable, whether rated or not, shall have a right to vote? Such is the doctrine which the counsel for the petitioner wish to establish.

Part of their argument goes to prove that it is not necessary to show misconduct. But is not the case of St. Ives in point to the contrary? Does not the case of the King and the parish officers of Weobly (1) show that the court of King's Bench

(1) *Supra*, vol. ii. p. 339.

thought

thought the sessions the only jurisdiction for trying the rateability of persons rated or not rated?

They tell us next, that they have proved * misconduct. How?—*Because the parish officers were friends to Mr. Wyldbore.*—Can that be charged as a crime on men entitled to vote in the choice of their representatives?—*Because the rate was not made in the vestry, according to the usage before 1768.*—But in truth this usage was an usurpation attended, or liable to be attended, with great inconvenience, and therefore wisely laid aside. The vestry is a mere ecclesiastical meeting, which existed previous to the statute of Queen Elizabeth. The provisions of that statute take no notice of it, and the acts to be done in consequence of those provisions have nothing to do with it. The preamble to the statute of 17 Geo. II. cap. 3. where it complains of private clandestine rates, means rates which were not made known to the parish after they had been assessed. What is the remedy provided? Not that they shall be made in the vestry, but that, *after they are made and allowed*, they shall be published in the church, and open to the inspection of every inhabitant (1) (D).—*The Appeal was dismissed when it ought to have been adjourned.*—But who ever heard of adjourning an appeal from a rate when the notice of appeal was illegal. By the *reasonable notice*, the neglect of which authorizes the Justices to adjourn an appeal, it has

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(1) § 1, 2, 3.

always been understood, that the legislature mean notice for a *reasonable time* before the hearing.—*Two of the Justices who dismissed the appeal, were the two who allowed the rate.*—But were they not entitled by law to sit on the hearing of the appeal? Is not the allowance of the rate a mere ministerial act, which the Justices must do without examination? This cannot disqualify them from taking part, in their judicial capacity at the sessions, in an enquiry into the merits and justice of the rate. Appeals from rates are not like those from orders of removal, where the two Justices who make the order act judicially (F). In such cases it has been [112] determined, that where there are corporation Justices, if an order of removal is made by two of them, the appeal must be to the county sessions (1).

It is contended, that, after the first appeal had failed, another would not have lain to the subsequent sessions. But the law hitherto has been understood to be, that such an appeal would have lain.* The statute of 43 Eliz. leaves the appeal at large. That of 17 Geo. II. limits it, in the cases there provided for, to the next sessions.

(1) *The King v. Malden* Burn, New Ed. v. iii. p. 490. Bott. 217. pl. 421. *East Donyland & St. Giles's Colchester.* Bott. *ibid.* Burn. *ibid.* 491. *from Burr. Sett. Cases*, p. 592.

* [It has been since determined, in the case of *Rex v. Coode & others*, overseers of the poor in the parish of Penryn, (B. R. Trin. 24 Geo. 3.) that an appeal under 43 Eliz. must be made to the next sessions.]

“ But,”

“ But,” says Dr. Burn, “ both may seem to stand well together, and then the sense of the statute of the 17 of Geo. II. will be this, That the appeal against any thing done or omitted by the overseers or justices, in cases where no appeal is given by former statutes, must be to the next session only; because the clause which gives the appeal, limits it to such next sessions; but in cases wherein an appeal is given by former statutes, [113] such appeal may be to the next sessions according to this clause, or may be according to the directions of such former statutes (1).” Agreeably to this construction, which till now has never been controverted, the parties who brought the first appeal in the present instance, being persons having a clear right to appeal under the statute of Elizabeth, might have lodged a new appeal at the subsequent sessions; for the first having been dismissed for want of notice, and without a hearing, it was to be considered as if it had never existed.

When it is asked, why the parties have not appealed from either of the rates made since the election, recourse is still had to the pretended partiality of the Justices; but does not their submission rather show that they were conscious that the merits of the former appeal were against them?

The point in the case of North Berwick, which has been relied on, was very unlike the present

(1) Burn, vol. iii. p. 303.

question. The petitioners in that cause were persons who could not have had redress in the court below. Besides, a complaint which had been lodged in that court, by persons competent in law to complain, remained in suspense, and undecided, when the trial of the petition came on. But, in the present case, every one of the electors was empowered, under the statute of 17 Geo. II. cap. 38. to litigate the rate at the sessions. The right of appeal is not confined, as has been argued on the other side, to persons on the rate. It is extended to *every person* who shall have any material objection to any person or persons being put on, or left out. (1). If, by a proceeding analogous to what was done in the case of North Berwick, a complaint had been lodged at the quarter sessions, but had not come on to be heard before the trial of the petition, this Committee might, perhaps, have thought themselves obliged to enquire into the grounds of the complaint. Where there is a charge of criminality in making the rate, which there has not been time to try in the ordinary judicature, the rate, in such case, must be of doubtful authority, and rateability will be resorted to. Where criminality is proved before the Committee, rateability, for the same reason, must be the criterion. But here there has been time to pursue the ordinary course, and it has not been pursued. Criminality has been alleged, but has not been

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(1) § 4.

proved.

proved: Under these circumstances, the Committee will surely think themselves precluded from going into any enquiry concerning the rateability of Felton and the others.

After the arguments were closed, the counsel, by the desire of the Committee, settled and agreed on the following state of the question, " Shall the " parties be permitted *now* to go into evidence to " prove that Thomas Felton ought to have been " admitted upon the rate in September, 1774 ?"

The Court being cleared, the Committee deliberated for a considerable time, and then the counsel were called in, and the Chairman said, he was directed to inform them, [116]

That the question had been resolved in the negative.

But that the Committee had also come to the following resolution:

Resolved, " That the counsel for the petitioner " be permitted to proceed to offer any evidence " they think proper, to prove any misconduct " relative to that rate."

The counsel for the petitioner still contended that they had laid a ground of misconduct, and said, they were ready to prove that Felton had been rated immediately before, and was left out of the rate of, 16th September, 1774. That this would be *prima facie* evidence of partiality and misconduct in those who made the rate of September, 1774. They said, they only meant to offer this in proof, as an additional circumstance to be thrown

thrown into the scale with the former evidence of misconduct, and therefore were not precluded, by what the Committee had just resolved, from calling * witnesses for that purpose.

They were told by the Chairman, That they might offer what evidence they pleased, with a view to misconduct.

Upon this they called Laxton to prove, that Felton* had been formerly rated, and was left out in September 1774, and that his circumstances were the same when left out of the rate, as formerly when he had been rated.

The counsel for the sitting member insisted, that this was contrary to the resolution of the Committee.

[118] Any proof that a man had been formerly rated, and was left out in the new rate, could not, they said, be received as evidence of misconduct, since a man's circumstances may have changed in the interval between the two rates, and the parish officers are bound to act according to the situation of the persons rated at the time of making each particular rate, and to vary the rate as their circumstances change (1). And they contended, that to bring evidence of what Felton's circumstances were at the time when he was left out, was, in fact, to bring evidence to prove that he ought

* The rates themselves would have proved this, and indeed were the proper evidence of it.

(1) Burn, vol. iii. p. 508.

to have been put upon the rate, and therefore, according to the resolution of the Committee, was not *now* admissible.

The court was cleared again; the Committee deliberated; and the counsel being called in, the Chairman informed them, after reading the second of the two former resolutions, that the Committee had put the following construction on their second resolution, *viz.*

Resolved, "That the counsel are not now at liberty to enter into the question of rateability (H)."

He then said, That they were to judge how far they would proceed under this restriction, and that the Committee were willing to adjourn till Monday. (↪ This was Saturday) that they might have time to consider and prepare such evidence as could now be offered. [119]

The counsel differed still about the extent of the restriction. On the part of the petitioner, they thought they might yet be admitted to prove, that Felton, and the others whom they meant to qualify, had been rated up to the 16th September, 1774, for certain property; and that they then continued in possession of the ~~same~~ property, and were, notwithstanding, left out of the rate; that this would be clear and sufficient evidence of misconduct in the parish officers; that, if such evidence were not admitted, misconduct in making a rate could never be proved, if the churchwardens
and

Committee having deliberated for some time, and the counsel being again called in, the Chairman told them, that he was directed to inform them of the following resolution :

Resolved, " That the Committee are of opinion, " that the evidence which the counsel for the " petitioner propose to offer, is inconsistent with " the resolution which the Committee have already " come to."

Upon this, the counsel for the petitioner said, they would give the Committee no farther trouble.

There was no general summing up on the part of the petitioner; no new case opened for the sitting member, and, consequently, no general reply. But it will be observed, that, in the beginning of the cause, the counsel for the petitioner produced evidence tending to impeach five votes [122] as given by persons fraudulently rated, and two as given by *pretended* householders within the precincts of the Minster, who, as they alleged, were not householders. If the evidence had amounted to proof of those allegations, and the Committee had thought all the seven votes bad, there would have remained on the poll an equal number of votes for Wyldbore and for Phipps. The Committee, on that supposition, must have determined that, as between them two, the election was void.

But, as the counsel for the petitioner did not think fit to sum up, and observe upon, the evidence they had produced, we must consider this as an admission, on their part, that enough had not been
been

N O T E S

ON THE CASE OF

P E T E R B O R O U G H.

Note
(A.)

PAGE 66. 91. 97. (A.) I do not find that either by statute, or any decision, a person qualified to serve as a parish-officer, can excuse himself, because he has served the office before; and yet it appeared to me that this was assumed as law by the counsel for the petitioner, and not contradicted on the other side. If the same person were for several years together appointed an overseer, merely for the purpose of vexation, and giving him trouble, "there being" other sufficient substantial householders within the parish," the quarter sessions on that ground would, perhaps, quash the appointment. Apothecaries within London, and seven miles thereof, and all apothecaries in any other place, who have served seven years apprenticeship, are exempted from the office of overseer, and all parish offices, by 6 Will. III. cap. 4.; and an attorney cannot be chosen overseer or churchwarden, or to any other office against his will. Com. Digest. 476. from Cro. Car. II. 585.

P. 81.

P. 81. 86. 89. (B). Upon as accurate an investigation as I have been able to bestow on the subject, I am inclined to think that "*scot and lot*" had not originally a specific signification expressive of any particular local or parochial taxes as I once conceived (*supra*, vol. i. p. 140). Both words are of Gothic or Teutonic origin, and are found in all those modern languages which have German, or Latin with a certain proportion of German intermixed, for their basis. "*Schoß*" in modern German, and "*schot*" in Dutch, mean "impost, tax, contribution" in general. * *Scotto* in Italian, and *Escot* or *écot*† in French, are, I believe, only used in the same familiar sense with "*shot*" in English, for the share of a reckoning. "*Schot-vry*, in Dutch, corresponds exactly to our phrase "*scot-free*‡," and "*schot en lot*," in that language, is explained to mean the same thing with "*schot*," taken alone§. So, I am persuaded, "*scot and lot*" is a mere tautology in English, adopted for the sake of the jingle in the sound; there being many instances of a like sort in all languages. In the laws relating to the sewers both words are indifferently applied to the

* [The *Udallers*, in the Orkney and Zetland islands, paid an annual tribute to the king, under the name of *Scot*, a Norwegian word, synonymous with *tax* in English; Case of *Resps*, Sir L. Dundas v. *Honeyman*, House of Lords, 1 May 1778. *Vide also Craig, Lib. 1. c. 9. § 24. there cited.*]

† "*Il s'arrêta tristement à la porte d'un cabaret. Deux hommes habillés de bleu le remarquèrent: Camarade, dit l'un, voilà un jeune homme très-bien fait, et qui a la taille requise: Ils s'avancèrent vers Candide, et le prièrent à dîner très-civile-*

ment. Messieurs, leur dit Candide, avec une modestie charmante, vous me faites beaucoup d'honneur, mais je n'ai pas de quoi payer mon écot." *Candide*, ch. 2.

‡ The popular sense of the expression "*scot-free*" may be well illustrated by the following example. "It was a rule with this great chancellor (Bacon) not to sell injustice, but never to let justice go *scot free*." Cited in *Hurd's Dial.*

§ [The word *εἶρε* in Greek seems, in many respects, to correspond to "*scot*."] *assess-*

Note
(B.)

assessments made by the Commissioners. This appears—By the extracts from the ordinance concerning Romney Marsh cited in Spelman (Title *scot* and *scottum*;—By the statute of 23 Hen. VIII. cap. 5. where mention is made of persons assessed to any *lot* or *charge* by the commissioners of sewers;—By the statute of 3 and 4 Edw. VI. cap. 8. which speaks of “all *scots*, *lots*, and *sums of money*,” taxed by virtue of the commissions of sewers;—By 7 Ann. cap. 10. which mentions *lot* or *charge* as synonymous;—And by many other instances which might be adduced. *Scot*, *shot*, or *lot*, therefore, was the share paid of the particular contribution which happened to be in contemplation when the term was employed, whether it was an assessment for the sewers, a reckoning in a tavern, or the parochial taxes. The argument of the counsel for the petitioner in this case of Peterborough, drawn from the expression “*bearing lot*,” is rather ingenious than conclusive; for taking “*lot*” (as I have supposed) to be synonymous with “*scot*,” and to signify a sum of money, “*to bear lot*” would be a very proper expression, as we say to “bear an expence,” or to “bear a tax.” In the statute for regulating elections within the city of London (11 Geo. I. cap. 18) “paying to the rates in lieu of watch and ward,” is enumerated among the circumstances which in London constitute the payment of *scot* *. It must be acknowledged, that in the same statute there seems to be a distinction made between the payment of *scot*, and the bearing *lot*. The electors of aldermen and common council-men must be, persons paying *scot*, as therein described, and also “*bearing lot when required*.” But it does not at all appear what is meant by “*bearing lot*.” It is likewise specially enacted, that they must be *householders*, which seems to be an acknowledgment of the legislature, that the description of “*paying scot and*

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* Vide Case of Seaford, *supra*, p. 41, 42.

"*lot*" does not necessarily comprehend the qualification of being "a householder."—I am informed by a very ingenious friend, and one well acquainted with the laws of Scotland, that the expression of "*To scot and lot*" in the burghers's oath in that country, does not (1), nor, as far as he can learn, ever did, mean "to pay any determinate specific tax or duty," but only the burghers's proportion of the common taxes and services affecting the borough.

However, the sense of "*scot and lot*" in the resolutions of the House of Commons is not to be ascertained by the ancient meaning of the words, or by arguments drawn from their etymology, or their signification in other languages or countries. There are no decisions on the rights of election in the Journals, till the reign of James I.; after the poor-rate was established. Most of those concerning boroughs, where the right is declared to be in persons paying scot and lot (of which there are in all about thirty, besides agreements with regard to about twelve more) have been made either in the present century, or towards the end of the last; and it is clear that in modern times "*scot and lot*" has always been understood to mean parish taxes, or "parish payments," which last is Dr. Johnson's explanation. (*Vide* Johnson's Dict.) These determinations will all be found to have been made upon evidence concerning the poor and church-rates. We must, therefore, I think, conclude that the House, by "the payment of scot and lot" have meant the payment of those taxes, and nothing else.

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There is, indeed, one very forcible argument against considering "the payment of scot and lot," in determinations on the rights of election, peculiarly to mean, "the payment of the poor-rate," and it is this; although, by the Statute of Geo. II. the last determination of the House is final, and becomes law, however absurd or unjust; yet still, in reasoning on the subject, we must suppose that, where

(1) For this oath *vide supra*, vol. i. p. 141.

Note
(B.)

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the right of election in a maiden borough has come to be decided by the House, and where that right does not depend on any charter, but is *prescriptive*, the decision is formed on evidence of *prescriptive* usage, and that it is only a declaration of what the right has been beyond time of memory. Now it is asked, How is it possible that, where the House has declared a prescriptive right of election to be in the payers of scot and lot, they should mean those who pay the poor's tax, since that was unknown till the time of queen Elizabeth? The truth is, the rule of legal prescription cannot be applied to this subject; for, in the first place, according to the system of a great many writers on the constitution, the representation of boroughs commenced considerably within the time of legal memory; and, secondly, there are numerous instances where the right of election resting merely on usage has been determined, or agreed, to depend on circumstances whose existence is of much more modern date than the period fixed by the law, as the boundary of legal memory. In such cases, where there has been a determination, to try them by the rule of prescription would be impossible, and even where the right has been long acquiesced in, and undisputed, without a determination of the House, it would occasion the utmost confusion. *Vide infra*, *Ild Case of Cricklade*. Note (C) .)

Note
(C.)

P. 84. (C.) It has never been determined, that Justices of the Peace are *exempted* from serving the office of overseer. In the case of the King and Gayer, Hill. 30 Geo. II. a person who was an acting Justice of the Peace, and also a lieutenant of marines, on half-pay, having been appointed overseer, the appointment was quashed by an order of sessions, and that order confirmed by the court of King's Bench. But the court did not decide, that the offices of Justice of the Peace and overseer are incompatible; or that a Justice can of right demand an exemption from being overseer. Burr. Settl. Cases, 245.—I believe, there is

Notes on the Case of Peterborough.

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is no office of any sort, if a man is a substantial householder, and chooses to act as overseer, which renders him *incapable* of being appointed,

Note
(C.)

P. 92. 99. III. (D). In Tawney's Case, (Lord Raymond, 1009 to 1013) Lord Holt, Ch. Just. said, "The churchwardens and overseers, with the confirmation of the Justices, may order a sum of money to be levied for the relief of the poor, without the concurrence of the parish."

Note
(D.)

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P. 94. (E). As this case, very probably decided the fate of this election, and there is only a short abridgment of it printed in Mr. Bott's Poor's Laws, p. 57. I have inserted a very full note of it; which I have reason to think, was taken by a gentleman of great eminence at the bar. Mr. Bott cites Mr. Ford's MSS. for his account of the case; but there must be some mistake in this, for Mr. Ford died before Hill. 27 Geo. II.

Note
(E.)

The KING against the JUSTICES of BERKSHIRE, Or,

The CASE of the Parish of ST. HELEN, ABINGDON. Hill. 27 Geo. II.

"It was moved last term to quash two orders made by the Justices of the Peace of Berkshire, at their quarter sessions, on an appeal from the poor's rate for Abingdon, upon the following exceptions:

"1st, That it appeared, that notice of the appeal was not given, till the day before the sessions began; whereas there should have been eight days notice: That the Justices (with a view, perhaps, to supply the defect of notice) adjourned the appeal, by the first of their orders, to the next

H 3

"day.

Note
(E)

" day, and directed the overseers, &c. to attend them there
" with the rate: That, on the next day, accordingly they
" went on to hear, and made the second order on the merits;
" whereas they ought, (as was insisted) whenever there is
" not proper notice, to adjourn the appeal to the next sessions.

" 2dly, That they should have inserted the whole rate in their order.

3dly, " That the complaint was, only, that some persons
" who ought to have been charged, were omitted in the
" rate; but the Justices had gone beyond the complaint, and
" had struck out one of the names inserted in it, which was
" no part of the complaint.

" 4thly, That the persons whose names were added by
" the order, to the rate, did not appear, by the order, to be
" inhabitants of the parish, nor to have any real, or personal
" estate there; and, by the 43 of Eliz. no person is liable
" to be rated but in one of these instances.

" 5thly, *That the names of the persons omitted in the rate,*
" *(which omission was the ground of the complaint) ought*
" *to have been set forth in the appeal; and notice ought to*
" *have been given to them.*

" Upon this, a rule, *nisi*, was granted.

" On another day, in the same term, Sir Richard Lloyd
" showed cause against the rule.

" As to the first objection, he observed, That the statute
" 17 Geo. II. cap. 38. § 4. makes the Justices sole judges
" of what notice is reasonable; and they had thought this
" so. Besides, this notice was the best that could be given
" from the nature of the case; the rate being made on Saturday, and published on Sunday; notice of appeal was
" given on Monday, and on Tuesday the sessions were
" held.

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" To the 2d objection, he said, it could not be necessary
" to insert the rate in the order; for, that the appeal was
" not

“ not from any thing in the rate, but for what was omitted,
“ and left out of it: That the order of the sessions was, to
“ amend it, by adding what was omitted; and, therefore,
“ nothing but their own amendments were to be inserted in
“ their order.

“ To the 3d objection, he said, the fact was, that they
“ had left the sum charged as they found it, and had only
“ changed the name of the person who was to pay it; and
“ this was occasioned by the overseers charging the mother,
“ when the son (whose name the Justices had inserted in-
“ stead of her's) was, in fact, the housekeeper: That this,
“ as he apprehended, they had, by the statute a right to do:
“ But, if the court thought otherwise, they might adjudge
“ that part of the order to be wrong, and confirm the rest.

“ To the 4th objection, that the act which gives the
“ Justices jurisdiction, does not require that the persons
“ added should be mentioned to be inhabitants, &c. though,
“ under 43 Eliz. which relates to rates by parish officers,
“ it may be necessary: That this might have been a good
“ objection to the rate, if the persons assessed had not been
“ mentioned in the *title* as inhabitants, &c. but could be
“ none to the order: That, in a rate to make one parish
“ contribute to the relief of another, it is necessary that the
“ parish should *in fact* be of ability, but not that it should
“ appear so: That it was solemnly determined in the case
“ of the King against Loyd, (2 Strange, 996.) that the
“ Justices need not set forth any thing, but what is neces-
“ sary to found their jurisdiction: That this would apply
“ also,

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“ To the 5th objection, which was, that the names of the
“ persons omitted, ought to have been inserted in the appeal:
“ That the Justices need only return, that there was an ap-
“ peal.

“ That another objection had been mentioned, viz, that
“ the appeal ought to have specified all the appellants: That

Note
(E.)

“ this would admit of the same answer, and that, besides, it
 “ is not necessary to insert them; for that, on the appeal of
 “ any one person, the Justices might determine every ob-
 “ jection to the rate: That in the case of the King against
 “ Almanbury, (Hill. 1 Geo. I. in Fortescue's Reports, and
 “ 1 Str. 96.) it was determined, that, had the Justices only
 “ stated that there was an appeal, without naming any ap-
 “ pellant, it would have been good: That every man lia-
 “ ble has a *right* to be rated; and, as appears by the cases
 “ of the King against Weobly (2 Str. 1259.) and the King
 “ against Fludyer *, if the parish officers refuse him, he may
 “ appeal to the sessions.”

“ Adjourned for the opinion of the court, which was now
 “ given, as follows:

[135] “ WRIGHT, J.—This was a motion to quash two or-
 “ ders of sessions, made on an appeal from a poor's rate.
 “ By the first, they adjourned the appeal, which appears to
 “ have been received the first day of sessions, to the next
 “ day, and directed notice to be given to the overseers, &c.
 “ to attend them at that time, with the rate. By the second
 “ order, they proceeded to adjudge the notice reasonable,
 “ and the complaint just; and then to insert and strike out,
 “ as they thought fit.

“ To these orders several objections have been taken.

“ 1st, That, by the first order, the Justices appear to be
 “ convinced that proper notice of the appeal had not been
 “ given; yet, instead of adjourning the consideration of it
 “ to the next sessions, as the act directs when there shall
 “ not be sufficient notice, they take upon themselves to di-
 “ rect a notice, and to adjourn to the next day only. This
 “ is the objection. But, in answer, it is said; The notice
 “ directed, is only to attend with the rate; The notice of

* *Quer.* Where reported.

“ appeal

“ appeal they adjudged sufficient, and the adjourned day
“ was not another, but the same sessions.

“ 2d, That the rate is not returned. It is not necessary.

“ 3d, That they have struck out the name of a person
“ not complained against. This is a strong objection; but
“ had it stood singly, that part of the order might have been
“ quashed, and the rest confirmed. This part of it was in-
“ deed given up.

[137]

“ 4th, That the persons inserted are not mentioned to be
“ inhabitants, &c. so that it does not appear they were rate-
“ able. I do not think it necessary that this should ap-
“ pear. The Justices have satisfied themselves in that re-
“ spect.

“ 5th, That the names of the persons inserted by the Jus-
“ tices were not set forth in the appeal. I do not think it
“ necessary that the sessions should return the whole ap-
“ peal. It is sufficient, if they return that there was an
“ appeal.

“ The principal difficulty with me is this:—They ad-
“ judge, that several persons were left out, without suffi-
“ ciently distinguishing who and what those persons were;
“ then they proceed to insert 15 or 16. Now, my doubt
“ is, whether the Justices ought not to have adjudged what
“ persons were left out, and then inserted the names of
“ those persons, and those only; for theirs is a limited au-
“ thority.”

“ DENISON, J.—“ I do not think it necessary to go
“ particularly through the several objections; my brother
“ has sufficiently answered the first.

“ As to the 2d, I remember a motion in the case of
“ Weobly, for removing a rate, and it was said *then*, that
“ the rate could not be removed, though there is an old de-
“ termination to the contrary*. But the question here is,

* *Quare.*

“ whether

Note
(E.)

" whether or not they ought to have set forth the rate;—
" which I do not think necessary.

" Whether the persons inserted have or have not been
" heard, is not to the present purpose, and therefore I shall
" give no opinion, as to the necessity of it.

" *What sticks with me is, whether the notice to the church-*
" *wardens, &c. who were to make their defence for not in-*
" *serting the persons whose omission is complained of, ought not*
" *to have expressed who those persons were, that they might*
" *have been able to account, at the sessions, for having omitted*
" *them, and come prepared to answer the complaint. It seems*
" *more reasonable that their names should be inserted. Or-*
" *ders are frequently quashed for uncertainty, in omitting to*
" *state that the persons complained of are chargeable, and*
" *the like. If this can be cleared, I see no weight in the*
" *other objections, nor impropriety in the orders. The whole*
" *is the uncertainty of the complaint.*

" It is not necessary to state the names of the appellants,
" even in the proceedings in a court of law; and there is
" no weight in the other objections."

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" FOSTER, J.—It is incumbent on the court to lay down
" some rule in this new case. The same difficulty sticks
" with me, that occurred to my brother Denison. I am not
" clear, that the persons inserted are inhabitants, &c. of the
" parish. The Justices are here in the place of the church-
" wardens and overseers. As it is necessary for the over-
" seers and church-wardens to show that the persons charg-
" ed are the proper objects of their authority, so, since the
" Justices, in this case, exercise an original authority, from
" which there is no appeal, it is equally necessary for them
" to do so."

" DENISON, J.—I meant, That the names of the per-
" sons should be expressed, and that they are liable to be
" charged."

" WRIGHT,

" WRIGHT, J.—I do not think it necessary that this
" should appear on the complaint, but it should appear
" somewhere, that the persons inserted by the Justices are
" liable."

Note
(E.)

" DENISON, J.—Suppose ten are complained of. The
" Justices may approve of the inserting of five, and not of
" the rest?"

" FOSTER, J.—This is an original authority, founded
" on a complaint, the uncertainty of which has often been
" held sufficient to quash an order of removal."

" The case was ordered to stand over for a day or two,
" when Wright, J. agreeing with the other two, the orders
" of the sessions were quashed." [140]

Throughout this report, *the notice of appeal* is sometimes called *the appeal*, and sometimes *the complaint*. Indeed the notice is the only instrument which brings the appeal before the court of quarter sessions; and, though there is no provision in any statute which requires even that it should be in writing, yet, by the general practice, as much nicety is expected in penning a notice as in drawing a declaration; and it is as common at sessions to object to the form of a notice of appeal, as it is in Westminster Hall to demur to the form of a declaration. This may serve in some degree to show how ineffectual the plans would be which have been proposed for getting rid of the niceties of special pleading. It is as hard upon a party to be prevented from entering on the merits of his cause, from an informality in an instrument of modern invention called a *notice*, as if it happened from a like informality in a *declaration*. The difference is, that blunders would be more common in the former, because the technical modes and forms of them have not been ascertained by a long train of decisions,

Note
(G.)

P. 97. (G). I have examined the entry of this resolution in the original minutes, and it is in the following words :

[141]

" The counsel called in, and acquainted by the Chairman, that the Committee are of opinion, that persons of rateable property, not being rated, and proving no misconduct against any persons in the management of the rate, to account for their not being rated, are not entitled to vote."

The reader will observe, that there is no material difference between these words and those in vol. I. p. 396. Case of St. Ives.

Note
(F.)

P. 95. 102. 111. (F). The legislature has clearly made a distinction between the appellate jurisdiction in cases of rates and of removals. Neither the statute of 13 & 14 Car. II. cap. 12. nor that of 8 & 9 Will. III. cap. 30. say any thing of corporation, or local Justices. The first enacts, (§ 2.) " That persons thinking themselves aggrieved, may appeal to the justices of Peace of the said county." And, by the other, (§ 6.) " The appeal shall be had, prosecuted, and determined, at the general or quarter sessions of the peace, for the county, division, or riding, where, in the parish, township, or place from whence such poor person shall be removed, doth lie, and not elsewhere." The reason why an appeal in cases of removal shall not be to local Justices, is given in the case of the King and Malden, (cited *supra*, p. 112.) " For then," Lord Ch. J. Parker said, " there would be an appeal *ab eodem & eundem*, there being, it may be, the same Justices sitting who made the order." That the Justices act *judicially* in making orders of removal, appears evidently from the case of the inhabitants of Berry and Arundel, 9 Will. III. (in 2 Salk. p. 479.) where the order was quashed, because it did not appear that there had been an *adjudication* of

of the Justices where the *pauper* had his last legal settlement. That, in the allowance of rates, they act only *ministerially*, was determined in the case of the King and the Justices of Dorchester, 7 Geo. I. (Strange, 393.) when the court said, "The two Justices are necessary to sign the rate *only by way of form*;" and in that of the King and the inhabitants of Uttoxeter, as cited by Bott, p. 58, from Mr. Ford's MSS*. It appears, therefore, that the legislature has not thought there is any reason why the same Justices who allow a rate, *ministerially*, may not, *judicially*, assist at the trial of an appeal from such rate, at the quarter sessions. Nay, as two Justices are sufficient to constitute that court, (Blackst. vol. iv. p. 268. 4to.) the two who allowed the rate may sit as sole judges on the appeal. Yet, by giving leave, in cases where there are not four local Justices, to appeal to the county sessions, the statute seems to suppose that there may be partiality exercised in allowing the rate; and, to show how difficult it is to make a complicated system of law entirely consistent, I do not find any provision in the statutes to prevent two county Justices, who have made an order of removal, from sitting as the only judges at the sessions, on an appeal from their own order. Probably the court of King's Bench would supply the defect, by deciding that the principle of the King and Malden extends to this case.

* In the very short note of this case in a Str. p. 932, the determination of this point is not mentioned. It is well known that, in Mr. Ford's Manuscript, a great many of the cases in Strange are reported at much greater length, and more completely, than by that author. I have had an opportunity of perusing his account of this case, and several others; but although those who have the pleasure of knowing his son, know how ready he is to permit his friends to consult this valuable work, it is much to be wished that he may some time or other make it public for the general benefit of the profession.

Note
(H.)

P. 118. (H). In general, a man must be actually rated, in order to have a right to vote as one paying scot and lot. The very resolution in the case of Newark (*supra*, p. 100, 101.) shews that, in other cases, where words expressive of rateability are not used, rateability is not sufficient. Yet there may be cases where *that, ex necessitate rei*, must be the only rule even when the words of the determination of the House are "paying scot and lot." If in a borough, where there are no other electors but inhabitants paying scot and lot, it should happen that no poor's-rate has been made for a long course of years (a case not impossible, though now perhaps not very probable) and that there is no inhabitant alive who ever was rated, there must be members chosen, and rateability would be the only possible measure of the right of election. If an assessment for the poor has been unnecessary, and has not taken place, only for a few years, shall the last rate be the rule? This can hardly be the case, because all, or many, of those on that rate may, at the time of the election, be reduced to poverty, and other substantial inhabitants may have come into the borough, for which

[144] reason the court of King's Bench has determined that there cannot be a standing rate, (2 Salk. 526.) Therefore, in this case also, rateability must be the standard. The difficulty is where to draw the line, and fix when the circumstances of the voters ought, and when they ought not, to be enquired into by Committees.—It was in a manner admitted on the part of the petitioner, in this case, that, where there has not been time to appeal from a rate, the Committee ought to go into the rateability; because, under such circumstances, the rate (being complained of before them) ought to go for nothing. But might it not be contended, that the rate immediately preceding, if not appealed from, or set aside, should, in such a case, be the rule, unless there has been such an interval as to render it probable that there

have been alterations in the circumstances of the persons rated? When a rate has been appealed from, and is confirmed, the decision of the sessions, by the stat. of Eliz. (43 Eliz. cap. 2. § 6.) *concludes and binds* all the parties to the appeal. Hence the court of King's-Bench will never go into the merits of a rate; "for," as is said in the case of Dorchester (cited *supra*, p. 142, Note F.) "whether a rate be fair or not, was never intended for their jurisdiction." A rate not appealed from is of the same force as if appealed from, and confirmed. But shall this extend to a Committee of Elections?—In the case of Seaford, rateability was gone into, although there had been time for an appeal, and none had been brought. But *there* the Committee may have thought there had been sufficient misconduct proved to entitle them to go into it, consistently with the resolution in St. Ives. Besides, the objection was not taken by the counsel.

[145]

Committees have gone into the rights of persons claiming to be freemen, who had been in possession long enough for *Quo Warrantos* to have been brought against them in the court of King's Bench; the only tribunal for the direct trial of corporate rights. In the case of Bedford, it was not only questioned whether persons claiming as honorary freemen, had a right to vote, but also whether they were legal freemen, and, although the persons objected to on that ground had been in possession for years, and no *Quo Warrantos* had been brought against them, the Committee tried the question of their title. (*Vide supra*, vol. ii. p. 81. &c.)

—There is this difference between persons voting as payers of scot and lot, and as freemen: When a man is put on the poor's rate, the direct object is not the acquisition of any franchise whatever (at least the statute under which the rates are made had no such thing in view); but, when a man is admitted to his freedom in a parliamentary borough, the acquisition

Note
(H.)

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acquisition of the right of voting, if annexed to the freedom, is a necessary consequence, and must be presumed to be one of the objects he has in contemplation: He means to entitle himself to all the privileges of a freeman, and to *that* among the rest. Can this difference give Committees of election a more free and immediate jurisdiction in the one instance than in the other? If it does, they are still less confined in their right of judging concerning the title to be on the freeholders roll in Scotland; for, as to *that*, the sole object in being put on the roll, and the sole franchise gained, is that of voting for the commissioner to Parliament; unless the right of voting on the making up the roll itself should be considered as a distinct privilege.

With regard to the resolution of the Committee in the present case, for restraining the counsel from giving evidence of the rateability of the voters, if we examine it by the rule laid down in the St. Ives' Case, it is of a complex nature; and comprehends a determination both of fact and law. If the Committee had thought that by the general evidence, *already given*, misconduct had been proved, they must have gone into the rateability. Therefore, in the capacity of a jury, they found that it was *not* proved by that evidence. Then, as a *court of law* adopting the rule in the case of St. Ives, they held that they could not receive the evidence of rateability; for that rule is, That, *no misconduct being proved*, persons, though of *rateable property*, are not entitled to vote. Now the evidence tendered respecting Felton was *only* to prove that he *was* of rateable property.

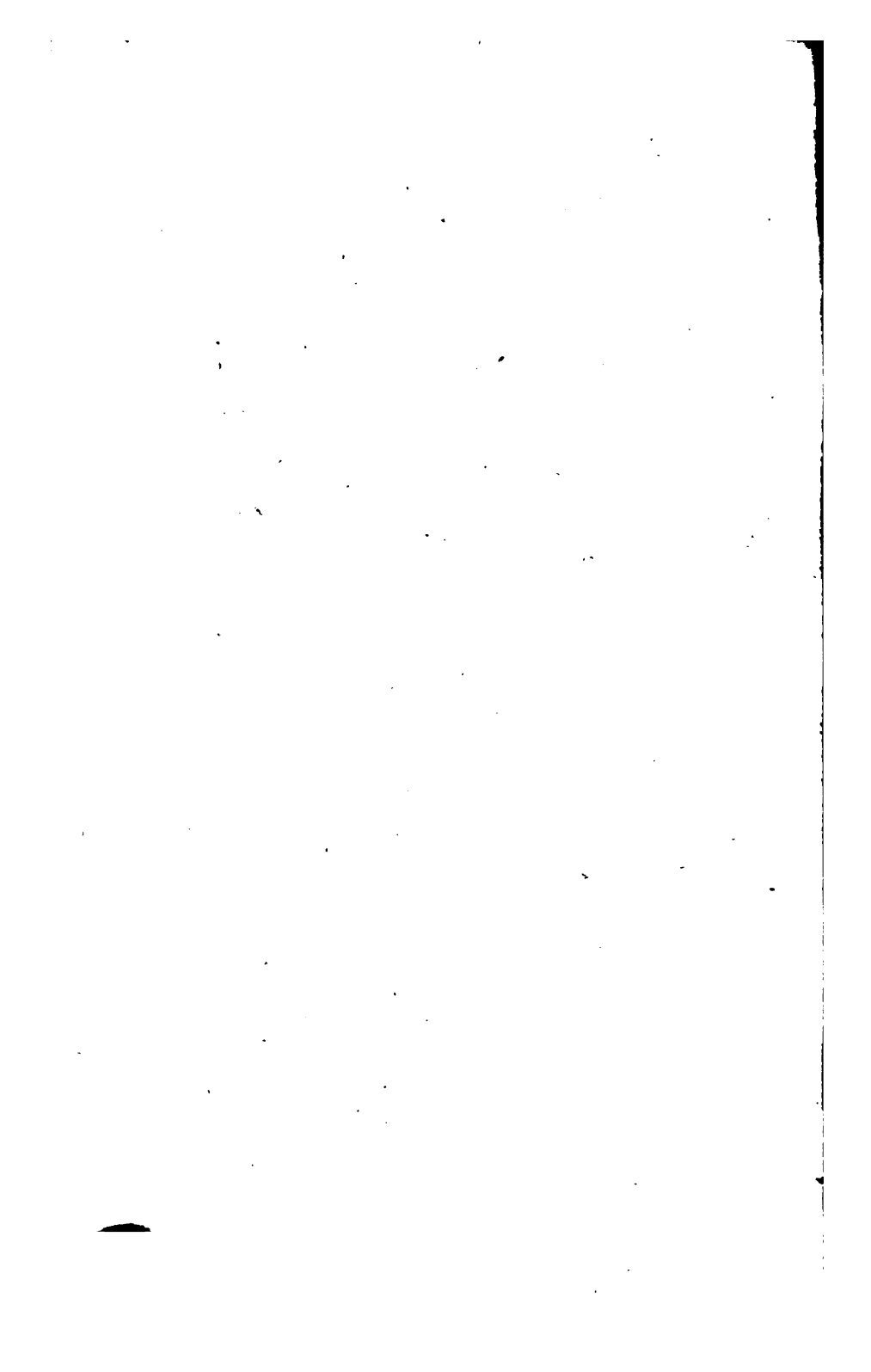
[147]

It is very true, that, if the rates are to have such binding authority, the parish officers, who are generally men in an inferior station, and exposed to undue influence, will have a very dangerous power over elections in scot and lot boroughs. But this is a defect in the constitution of those boroughs; and, like the abuse of the right of making honorary freemen
in

in others, can only be properly and effectually remedied by the interpolation of the legislature *.

Note
(H.)

* [*Vide* case of *Seaford*, 1786, 3 Lud. Note H. p. 125, and the case of *Shaftesbury*, 1781, there cited, p. 128. In the case of *Leominster*, 1791, and in that of *Seaford*, 1792, the same question, of the conclusive effect of the poor-rate unappealed from or confirmed, was much agitated. In the case of *Fowey*, in 1791, the Committee permitted the counsel to prove the rateability of a voter not on the rate, who had tendered his vote as a scot and lot man, (that being a concurrent right in *Fowey*), as a circumstance, to shew, that a rate which had been appealed against and confirmed, was *partially* made, and therefore not binding. *Vide* the case of *Rex v. Atkins*, 4 Term. Reports 12. *Vide* also the case of *Newark* 1791. 1 Fras. 265. and the case of *Westminster*, 1791, cited, *ibid*, p. 168, 169.]



XXVIII.

THE
C A S E

Of the BOROUGH of
IVELCHESTER,

In the County of SOMERSET.

The Committee was chosen on Friday, the 24th of November, and consisted of the following Gentlemen :

Frederick Montagu, Esq. Chairman	Members for	Higham Ferrers.
John Frederick, Esq. - - - -		Newport, Corn.
Thomas Hill, Esq. - - - -		Leominster.
Hon. Charles Marsham - - - -		Kent.
Hon. Thomas Francis Wenman -		Westbury.
William Drake, jun. Esq. - -		Agmondesham.
John Dyke Acland, Esq. - - -		Callington.
Hon. Charles Greville - - - -		Warwick.
Lord Guernsey - - - - -		Maidstone.
John Adams, Esq. - - - - -		Carmarthen.
Filmer Honeywood, Esq. - -		Steyning.
Lord Charles Spencer - - - -		Oxfordshire.
Christopher Griffith, Esq. - -		Berkshire.
N O M I N E E S,		
<i>Of the Petitioners :</i>		
Richard Whitworth, Esq. - - -		Stafford.
<i>Of the Sitting Members :</i>		
Herbert Mackworth, Esq. - -		Cardiff.

P E T I T I O N E R S :

Richard Brown, Esq. and Inigo William Jones, Esq.
James Corry and John Cox, on Behalf of themselves and
others, being Inhabitants, Householders, Parishioners,
and Voters within the Borough of Iwelchester.

Sitting Members :

Peregrine Cust, Esq. William Innes, Esq.

Counsel for the Petitioners :

Mr. Mansfield, Mr. Alleyne.

For the Sitting Members :

Mr. Lee, Mr. Morris.

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THE
C A S E

Of the BOROUGH of

I V E L C H E S T E R.

ON Saturday, the 25th of November, the Committee being met, the two petitions were read. They were in substance nearly the same.

That of Mr. Brown and Mr. Jones set forth; That Mr. Christopher Lockyer, bailiff and returning officer of the borough of Ivelchester, being a known friend to the sitting members, had shown great partiality in their favour; and had admitted many persons to poll for them who had no right to vote, and rejected several persons who had a right to vote, and had tendered their votes for the petitioners: That the sitting members, by themselves, their friends, and agents, were guilty of bribery [152]

and treating: That the petitioners had a majority of legal votes, and ought to have been returned (1).

The petition of Corry and Cox alleged, That they were legal voters, and had tendered their votes, but were rejected; while others, claiming under the same right, were admitted to vote for the sitting members, as were also persons who had no right: That money and provisions were given, and promises of rewards made, to many of the voters, to influence them to vote for the sitting members; by means of which undue influence they were returned (2).

[159] Although the allegations in both petitions, of the refusal of legal votes, and the admission of illegal ones, seemed to import that the petitioners meant to raise a question concerning the right of election, their counsel confined themselves, on the trial of the cause, to the charge of bribery and treating.

There is no last determination of the right of election in Ivelcheſter. The conſtitution of the place is as follows: It is a borough by preſcription, and, according to Willis (3), ſent members to Parliament from the time of Edward I. till 34 Ed. III. From that time it did not chooſe representatives till 12 Edw. IV. nor, after that year, till 18 Jac. I. when it was reſtored to its ancient privileges. By a charter granted 3 and 4 Phil. and Mar. the inhabitants were incorporated by the name of the

(1) Votes, p. 30, 31 Oct. 1775.

(2) *Ibid.* p. 66, 8 Nov. 1775.

(3) Willis, Notit. Parl. vol. i. p. 45.

bailiff and burgesſes of Ivelcheſter. There was to be a bailiff and twelve capital burgesſes, who were to chooſe annually, on Monday before Michaelmas, one of themſelves to be bailiff for the enſuing year; on the death of any of the capital burgesſes, his or their place to be ſupplied out of the common burgesſes, by the election of the remaining capital burgesſes. The charter ſays nothing of the qualification neceſſary to common burgesſes; nor of the mode of electing the members of Parliament. [154]

28 Jan. 1702-3. By the report of Mr. Bromley, Chairman of the Committee of privileges and elections, to whom petitions complaining of an undue election and return for Ivelcheſter had been referred, it appears;

“ That the right of election was *agreed* to be
“ in the bailiff, capital burgesſes, and inhabitants,
“ not receiving alms (1).”

And, on the preſent occaſion, both parties ſeemed to admit, that, by the *uſage* of the borough, an inhabitant, in order to be qualified to vote, muſt be a houſholder, and have a legal ſettlement (2).

The Numbers on the poll were,

For Mr. Innes	- - - - -	103
For Mr. Cuſt	- - - - -	102
For Mr. Brown	- - - - -	53
For Mr. Jones	- - - - -	53

(1) Journ. vol. xiv. p. 147, col. 1.

(2) *Vide infra*, Caſe of Cricklade, Note (C.)

C A S E XXVIII.

[155] The counsel for the petitioners undertook to prove, that such a number of the voters for Cuft and Innes had been bribed, as, when deducted from the poll, would leave the majority of legal votes in favour of Brown and Jones, so as to entitle them to be declared duly elected. And, if they should not succeed in affecting a sufficient number of the votes for the sitting members to answer that end, still they said they would prove acts of bribery by them or their agents, so as to avoid the election, by rendering them incapable of retaining their seats.

The counsel for the sitting members, after attempting, by evidence, and argument, to overturn the case which had been made against them, endeavoured to prove, that Brown and Jones, by bribery, or promises, had disqualified themselves, even if the majority of legal votes had been in their favour, and consequently that, at all events, they could not be declared duly elected.

[156] All the acts of bribery, and the corrupt promises, charged on the two sitting members, were by the intervention of agents, and long before the *teste* of the writ. It appeared, that, when the gifts and promises were made, Mr. Cuft and "*his partner*" were mentioned to the voters, but Mr. Innes's name was not specified, and was not at all known in the borough till a few days before the election; when he canvassed along with Mr. Cuft and his friends. All those who had engaged their votes

votes for Cust and "*his partner*," voted for Innes as the partner.

The promises imputed by some of the witnesses called on the part of the sitting members to Brown and Jones, were said to have been made directly by themselves, during their canvass on the election-week.

From a careful perusal of the minutes, it appeared to me, that, supposing the gifts and promises to the voters for Cust and Innes such, and so proved, as to destroy their votes, yet the evidence did not go to a number sufficient to leave a majority of uncorrupted votes in favour of Brown and Jones. This being the case, it was, perhaps, unnecessary for the Committee to form any opinion as to the operation of the evidence against the two petitioning candidates, since they, not having the majority of legal votes, could not, according to the law as at present understood, be entitled to sit (1). If the Committee had thought that no acts of bribery were brought home, through the medium of persons to be considered as agents, to the two sitting members, they must have declared them duly elected. The Committee therefore, in order to determine that they were not duly elected, must have been of opinion, both that acts of bribery had been committed by per-

(1) *Vide supra*, vol. ii. Case 415. *Infra*, Case of Wor- of St. Ives, Note (B.) p. 414, ceter.

sons alleged to be agents for Mr. Cuff and Mr. Innes, and that those persons were really to be looked upon as their agents.

[158] ↪ It was once my intention to have stated minutely the facts of which evidence was given, to establish a privity and connection between those persons and the sitting members, because it seems to be a *desideratum* with many, that certain rules should be established for ascertaining what does, and what does not, amount to proof of agency, in cases of bribery. On further consideration I have altered my design, and have resolved to omit this part of the case, as I had done in the former cases of bribery, reported in the first and second volumes of this work, and for the same reasons. Those reasons I shall probably take an opportunity of mentioning on a future occasion.

In the course of the cause many questions of evidence were argued by the counsel in like manner as in the former bribery causes. This indeed must happen in all cases of this sort.

[159] 1. The counsel for the petitioners having begun to examine John Loyd, concerning a conversation with certain voters, in which the voters had acknowledged that they had been bribed in order to vote for the sitting members; The counsel on the other side objected to their pursuing their questions, so as to charge the sitting members themselves with bribery, by such evidence. After some argument, the counsel for the petitioners agreed that

that evidence of the declarations of the voters could only be admitted to affect the voters themselves, and not third persons. The question first put, objected to, and given up, was, "Whose money did you understand it to be, which the voters said they had received?" The question which it was agreed might be put, and which was put, in lieu of the other, was, "Did the voters, when they said they had received the election money, say in whose interest they were to vote, in consequence of their taking this money?"

2. One William Handover, a witness called on the part of the petitioners, was going to relate a conversation which passed between him and one James Pitman, alleged to be an agent for the sitting members, and dead since the election. [160]

This was objected to.

It was contended, that evidence of any acts of a supposed agent could not be admitted, until proof of his being an agent had been previously produced to the Committee; That the propriety of such a rule is obvious, because, otherwise, many days might be employed in hearing evidence against a person, who might appear afterwards to have no connection with the cause; That, by the printed history of the two cases of Hindon (1) and Shatfebury (2) it appeared that such a rule had been laid down in both those cases.

(1) *Supra*, vol. i. p. 173.

(2) *Supra*, vol. ii. p. 310.

On the other side the counsel insisted,

[161] That it would be found impracticable to adhere to this rule, for that the circumstances which were to prove that a person had bribed, and that, in so doing, he had acted as the agent of another, very often the same, or, at least, so complicated together, that they could not be separated; and that the Committee in the case of Bristol had, on that account, over-ruled an objection like the present (1).

When the counsel had argued the point, the Chairman said, that he had enquired into what had been done by the Committee, in the case of Shaftesbury, and that he had been informed by the gentlemen who had sat in that Committee, as well as by some of the counsel in the cause, that, although on the first day of the trial a resolution had been come to agreeable to what is stated in the printed report of the case, yet they had afterwards found such inconvenience attending the rule, that it was agreed on all hands not to abide by it. That, accordingly, in the course of the trial, it [162] was not adhered to after the first day.

Upon this observation from the Chairman, the counsel for the sitting members desisted from the objection (2).

3. One John Triptree, a witness called on the part of the sitting members, swore, That some days before the election, Mr. Jones asked him for

(1) *Supra*, vol. i. p. 280.

(2) *Vide infra*, Case of Worcester, Note (A.)

his vote, and said, that if he would vote for him he would give him fifty guineas after the election. That, until he came to town in consequence of the Speaker's warrant, he had never mentioned this circumstance but to one Target, a person who had been a witness in the beginning of the cause, but who had died pending the trial, and before this evidence was given by Triptree. That since he had been in town, and before Target died, he had mentioned it to several persons, of whom he named three.

The counsel for the sitting members proposed to call those three persons to corroborate what Triptree said, of having mentioned the promise of the fifty guineas to them. [163]

This was objected to.

It was said, That it is an established rule, that when a witness is examined in *chief* to any fact, you are not to call evidence to corroborate his testimony, unless the opposite party shall first bring evidence to impeach it. To prove how strictly this rule is observed, a case was cited of *Halliday v. Sweeting*, which had been decided in the court of King's Bench about a week before (Michaelmas, 16 Geo. III.) That case was shortly this: Mr. Halliday, one of the members for Taunton, after the determination of last year in his favour (1), brought an action on the statute of 2 Geo. II. cap. 24. against Sweeting, to recover the penalty of

(1) *Supra*, vol. I. p. 375.

500*l.* for having offered a bribe to one White. To prove the fact (at the assizes) White was called and swore to the offer. After he had been examined, his wife and sister were called to prove, that, before the trial, he had told the same story to them. An objection was made to the admission of those witnesses, as no evidence had been produced to impeach the testimony of White. The plaintiff's counsel had presumed his credit would be attacked, because he had been contradicted on the trial of the Taunton election, before the Committee. The Judge of assize admitted the corroborating evidence; but, as he declared, with great reluctance; and, on a motion for a new trial, on the ground of its inadmissibility, the court granted the new trial.

The counsel for the fitting member answered;

That the rule contended for, is not general; for that, in cases of rapes, after the woman has given her evidence of the rape, it is the constant practice to admit her friends and relations, to prove her having told them of it about the time when it happened: They said, that it was from candour they had proposed, at that time, to call the witnesses to corroborate the testimony of Triptree, in order that he might have no opportunity of communication with them before they should give their evidence.

The

The counsel for the petitioners insisting on their objection, the point was given up on the part of the sitting members.

4. James Corry being called, was rejected, because he was one of the two persons who had signed the petition on behalf of the electors. His inadmissibility was on all hands agreed upon, Similar instances have occurred before several other Committees, during this and the last session.

5. One Charles Gillet was proved to have received ten guineas, in order to vote for the sitting members; and it was admitted, on the part of the sitting members, that, by this act, his vote was destroyed. But the counsel on that side having called him to give evidence, that he did not know the money to be Mr. Cuff's or Mr. Innes's;

The counsel for the petitioners objected to his testimony, on the ground of its tending to exculpate himself. [166]

The Committee over-ruled the objection.

In fact, however, he was never produced as a witness.

The Committee, after hearing the evidence of one James Rogers, and confronting him with some other witnesses, having cleared the court, resolved,

“ That the Chairman do report to the House,
“ that James Rogers, being called as a witness be-
“ fore the Committee, has grossly prevaricated in
“ giving his evidence.”

And, accordingly, on the same day, (Monday,
27 Nov.

27 Nov. 1775) agreeably to the 26th section of 10 Geo. III. cap. 16. the Chairman did report to that effect; and the House being moved, that the entry in the Journal of the House, of the 11th day of May, 1772, of the proceedings of the [167] House, in relation to Mary Hoffe (1) might be read; and the same being read, the following orders were made:

Ordered, " That the said James Rogers, having
 " grossly prevaricated in giving his evidence before
 " the Select Committee, appointed to try and de-
 " termine the merits of the petition of Richard
 " Brown, and Inigo William Jones, Esquires, and
 " also, the petition of James Corry and John
 " Cox, on behalf of themselves and others, being
 " inhabitants, householders, parishioners, and
 " others, within the borough of Ivelchester, in the
 " county of Somerset, severally complaining of an
 " undue election and-return, for the said borough,
 " be, for his said offence, committed to his Ma-
 " jesty's gaol of Newgate."

Ordered, " That Mr. Speaker do issue his war-
 " rant accordingly (2)."

[168] On Friday the 1st of December following, the Chairman presented to the House, in consequence of a motion for that purpose, a petition of Rogers, setting forth, " That he was extremely sorry for

(1) *Supra*, vol. i. p. 88, 89.

(2) *Votes*, p. 127, 128.

" having

“ having incurred the displeasure of the House,
 “ by prevaricating in his evidence before the Com-
 “ mittee; that he was sensible of his great offence,
 “ and of the justice of the House; and hoping, as
 “ his farther confinement would be prejudicial to
 “ his health, that the House would order him to
 “ be released (1).”

On this petition it was ordered,

That he should be brought to the bar of the House, on the Monday morning following, in order to his being discharged, and that the Speaker should issue his warrant accordingly (2).

On Monday, the 4th of December, he was, according to order, brought to the bar; where he received a reprimand from the Speaker, and was ordered to be discharged out of custody, paying his fees (3).

[169]

During the whole course of this cause, the Committee made it a rule, to order the clerk to read over to every witness, the minutes of his evidence, that he might set right any mistakes made in taking it down.

They also made it a rule, where one witness directly contradicted what another had sworn, to call in such other witnesses, and confront them together.

On Monday, the 4th of December, the Committee, by their Chairman, informed the House, that they had determined,

(1) Votes, p. 149.

(2) *Ibid.*

(3) *Ibid.* p. 153.

That none of the four candidates were duly elected.

And that the last election, for the borough of Ivelchester, was a void election (1).

[170] On which a warrant for a new writ was immediately ordered (2).

(1) Votes, p. 153.

(2) *Ibid.*

XXIX.

THE
C A S E
Of the BOROUGH of
C A R D I G A N,
AND ITS
CONTRIBUTORY BOROUGHES,
In the County of CARDIGAN.

The Committee was chosen on Tuesday, the 28th of November, and consisted of the following Gentlemen :

John Orde, Esq. Chairman	-	-	Midhurst.
Matthew Wyldbore, Esq.	-	-	Peterborough.
Hon. Charles Finch	-	-	Castle Rising.
James Worsley, Esq.	-	-	Yarmouth, Hants.
Anthony Bacon, Esq.	-	-	Aylesbury.
Sir George Howard, K. B.	-	-	Stamford.
Charles Dundas, Esq.	-	-	Richmond.
Abel Smith, Esq.	-	-	Aldbor. Yorkshire
Sir John Goodricke, Bart.	-	-	Pontefract.
Thomas Lister, Esq.	-	-	Clitheroe.
Jervoise Clarke, Esq.	-	-	Yarmouth, Hants.
Sir George Robinson, Bart.	-	-	Northampton.
George Pitt, jun. Esq.	-	-	Dorsetshire.
N O M I N E E S,			
<i>Of the Petitioners :</i>			
Robert Henley Ongley, Esq.	-	-	Bedfordshire.
<i>Of the Sitting Members :</i>			
Bamber Gascoigne, Esq.	-	-	Truro.

P E T I T I O N E R S :

Thomas Johnes the younger, Esq.
Several Burgeffes of the Boroughs of Cardigan, Aberistwyth, and Lampeter, on Behalf of themselves, and other legal Burgeffes of the said Boroughs.

Sitting Member :

Sir Robert Smyth, Baronet.

C O U N S E L,

For the Petitioners :

Mr. Mansfield, Mr. Lee.

For the Sitting Member :

Mr. Kenyon, Mr. Graham.

(173)

THE
C A S E
Of the BOROUGH of
C A R D I G A N,
AND 178
CONTRIBUTORY BOROUGH.

ON Wednesday, the 29th of November, the Committee being met, the two petitions were read. They were both nearly in the same words, and set forth; That, at the late election, when Mr. Johnes and Sir Robert Smyth were candidates, the former had a majority of legal votes upon the poll; That Thomas Colby, Esq. the returning officer, permitted a great number of persons to poll for Sir Robert Smyth, who had no legal right to vote, and rejected the votes of divers others duly qualified, who offered to poll for Mr.

Johnes ; and was guilty of many other notorious acts of partiality and injustice (1).

* The last determination of the right of election being next read, appeared to be as follows ;

7 May, 1730. Resolved, " That the right of election of a burges, to serve in Parliament for the town of Cardigan in the county of Cardigan, is in the burgeses at large of the boroughs of Cardigan, Aberistwyth, Lampeter, and Atpar, only (2)."

Then the standing order of 16 Jan. 1735-6 was read (3).

The following circumstances relative to the constitution of the different boroughs, (which were in part proved in the course of the cause, and have in part been collected from the information of those who are in a situation to be best acquainted with them,) are premised to what is properly the history of the case, in order to render more intelligible the several points that occurred, and were argued and determined on the trial.

[175] CARDIGAN, the *mother* borough, where the election is holden, and to which the others are said to be contributory, is a borough by prescription. Its present constitution depends either on prescription, or charters granted at different times, and under different reigns. Of those charters there is

(1) *Votes*, 31 Oct. 1775. (3) *Supra*, vol. i. p. 99, p. 28, 190.

(2) *Journ.* vol. xxi. p. 574. col. 1.

one of the 14th Hen. III. granting an exemption to the burgesſes of Cardigan from tolls, paſſage, and pontage; one of the 34 Hen. III.; one of the 13 Edw. I.; one of the 15 Ric. II.; one bearing date 22d of September, in the 19 Ric. II. and confirmed in Parliament in the 1st Hen. VIII.; and two of Hen. VIII. the firſt bearing date the 12th of May, in the 4th year, the other, dated the 24th October, in the 19th year, of his reign.

By the laſt mentioned, among other things, the King grants,

“ That the burgesſes, and their ſucceſſors, for
 “ ever, ſhall of themſelves chuſe one mayor and
 “ two bailiffs, on Monday next after the feaſt of
 “ St. Michael, who ſhall do and exerciſe that
 “ which belongeth to the offices of mayor and
 “ bailiffs, within the town of Cardigan, and bo-
 “ rough of the ſame, having firſt been ſworn before
 “ the chamberlain of South Wales, or his lieute-
 “ nants, faithfully to perform thoſe offices.”

[176]

No records, or entries of the proceedings, of the borough have been preſerved, of a date prior to the time of Charles I.

There are two courts holden before the mayor. One, the *town-court*, for the trial of civil actions. This court uſed to be kept on every Monday fortnight, throughout the year; but it has been neglected for ſome years, and no buſineſs done at it. The other is the *court leet*, for the town and liberties of Cardigan. This is holden twice a year; viz. on the firſt Monday after Michaelmas, when the mayor

and bailiffs are chosen according to the charter ; and on the first or second Monday in May.

[177] At the court-leet, the mayor acts as steward, and a jury of burgeses is sworn to inquire into, and present, all matters belonging to the corporation, and all manerial rights. New burgeses are, properly speaking, elected by this jury ; for they present such persons as they think fit to be made free of the borough, the form of presentment being, " We present J. F. of ———, in the county " of ———, yeoman, (or Esquire, &c.) to be " a burges for the town and borough of Cardigan, " in the county of Cardigan ;" and the person so presented may come at any future time and take the oath of a burges, which is administered by the town-clerk in the presence of the mayor. No previous title is necessary in order to be made a burges. It appears to be the usage to adjourn the court-leet for the purpose of presenting burgeses for weeks or months, without observing any particular days for holding it in consequence of such adjournment.

[178] Till the year 1765, when the last general stamp act (1) was made, the names of the burgeses presented and sworn, were entered or enrolled in the court-leet book ; and, from the establishment of the stamp laws till the alteration made in them by that statute, each burges so presented and sworn, had a docket of his admission, written on a slip of stamped parchment,

(1) 5 Geo. III. cap. 46. *Supra*, vol. ii. p. 158, to 160.

and signed by the mayor and town-clerk, delivered to him. Since 1765, in consequence of the change then introduced in the law on this subject, a stamped book has been kept, in which the town-clerk, at his leisure, enters the names of the new burgesses. This is called registering, or enrolling.

In the entries of the old presentments before 1765, opposite to the names of the persons sworn, is written "*Jur.*" or "*S.*" i. e. "*sworn*," and after some names "*A. and S.*" which some of the witnesses examined before the Committee explained to mean, "*appeared and sworn*." Sometimes "*R*" is written after a name, which is said to mean "*rejected or refused*," though in the more modern presentments it means "*registered*." [179] When there is no special date annexed to the mark signifying that a burgess has been sworn, it is presumed that he was presented and sworn at the same time. In cases where he has been presented at one court, and sworn at a subsequent one, the date of the swearing is annexed.

For example,

" Presented, 3 Oct. 1720.

" Tho. John, *jun.* *Jur.*

" Evan Jenkin, *R.*

" John ap John, *R.*

" William Jones, { *Jur.* 10 Aug.
1723."

In the year 1653, a Common Council, which

* *Quer.* If a person, after he is presented, can be rejected?
was

was no part of the ancient constitution, was established in the following manner. At the court leet held on the 9th of May in that year, the jury presented, That it was necessary that a council of
 [180] Twelve, being *aldermen**, and sufficient burgessees of the said town, should be added to the mayor for the time being, to advise him for the good of the corporation. Twelve persons were accordingly named in the same presentment, and were the first Common Council; and vacancies by death or otherwise, have ever since been presented by the jury, and filled up from time to time by the majority of the survivors. The proceedings of this Council are entered in a book called the Council-book, which will be mentioned afterwards.

ABERISTWYTH is a borough by prescription; is governed by a mayor and two serjeants; and has a court-leet holden twice a year, where burgessees are made in like manner as at Cardigan, the mayor being the presiding officer of the court.

LAMPETER is also a borough by prescription, governed by a port-reeve and two stewards. The port-reeve presides in the court-leet, and burgessees are presented and sworn as at Cardigan.

[181] The borough of ATPAR is likewise prescriptive. The chief officers are a port-reeve and two

* *Quer.* What constitutes an Alderman in this borough?
 bailiffs,

bailiffs, and the method of creating burgesſes the ſame as in the other three boroughs. In 1741 judgment of ouſter having been obtained againſt the port-reeve of that year, there has been none choſen ſince, nor any corporate act done in the borough. The members of the corporation are now ſaid to be reduced to two burgesſes*; and even they, when they came to poll at the laſt election, could not, or, at leaſt, did not, produce any ſtamped entry or docket of their admiſſion.

As no particular qualification is neceſſary in order to be choſen a burgeſs of any of theſe boroughs, and as all burgesſes, whether reſident or not, have a right to vote, it has been uſual, previous to an election, to admit great numbers. Above 4000 were admitted at Cardigan alone between the beginning of the year 1774 and the laſt election, which was in October of the ſame year. Their votes, however, were not good on that occaſion, as they had been admitted within the year. [182]

The election began on the 20th of October. Among ſeveral rules laid down and followed by the mayor, during the courſe of the poll, one was, "That he would admit every perſon to poll who would ſay he was a burgeſs of one of the four boroughs, and had polled at a former election." Mr. Johnes's managers objected to this rule, and inſiſted, that none ſhould be allowed to vote who did not produce entries of their admiſſions on

* *Quere.*

stamps if admitted burgessees since 1765, or stamped dockets of their admissions, if made free prior to that time. The mayor, however, adhered to the rule, and only demanded to see the stamped admission of such as had never polled before. The corporation books of Cardigan, Aberystwyth, and Lampeter, were on the table, and when a reference to the books was demanded on the part of Johnes, the managers, on the other side said, "There are [183] "the books, you may look at them;" to which they replied, that it was incumbent on the voter to prove his title. After this sort of dispute, the mayor admitted the vote, if for Sir Robert Smyth, without any reference to the books.

By stat. 3 Geo. III. cap. 15. § 4. "The corporation-books shall be referred to at the election, "in case any dispute shall arise touching the right "of any person to give his vote thereat." The admissions of all those who voted for Johnes, were produced before they polled; and both the mayor, and the managers for Sir Robert Smyth, often examined the entries and admissions, and put questions to Johnes's voters concerning their being the identical persons whose names appeared in the books. Of those whose votes were received for the sitting member, about 249 declared at the poll that they had no admissions *to produce*. About 134 said, they *never* had any admissions.

On the morning of the election, at the mayor's lodgings, before the poll began, Mr. Penoyre Watkins, the principal manager for Johnes, having
asked

asked the mayor what rules he meant to follow at the poll, Mr. Cuthbert, a gentleman who attended as counsel for Sir Robert Smyth, answered, in the mayor's presence, "The legal right will be the "mayor's rule of conduct." On his asking, What evidence he would require of the right of a burges? Mr. Cuthbert answered, "What was "done at the last poll will be legal evidence of the "right." It appeared, that, at the election to which he referred, they had begun by requiring evidence of the admission of the voters, but that all the parties had, afterwards, *agreed* (in order to shorten the duration of the poll, and prevent confusion and a scarcity of provisions, which were apprehended from the immense concourse of people) to admit on the poll all who claimed a right to vote, and that there should be a scrutiny after the poll. Afterwards, on some breach of the agreement during the course of the poll, the scrutiny did not take place.

Mr. Cuthbert, being examined as a witness, said, [185] That, on the morning of the election, during the conversation mentioned to have taken place at the mayor's lodgings, one of Johnes's agents asked the mayor, If he would grant a scrutiny, if demanded? and that the mayor replied, "I have no objection "to it," and said, he would grant it. He said, he was sure the question was asked by one of Johnes's agents. That he thought it was Mr. Penoyre Watkins; and that he (Mr. Cuthbert) always understood that the mayor had given a promise

mise of granting a scrutiny. Mr. Watkins said, in his evidence, that he recollected nothing of that sort, and did not remember there had been any talk about a scrutiny.

[186] Such was the principal and most essential part of the evidence concerning the conduct of the mayor, and the partiality charged upon him by the petitioners; in consequence of which their counsel contended, that, as all who presented themselves for Sir Robert Smyth, saying they were burgesses, and had polled at former elections, were received on their own assertion, without any evidence of their right, it now lay on the counsel for the sitting member to produce evidence before the Committee, to establish the right of all his voters; except those, who, not having pretended that they had ever polled before, produced their admissions at the election. The number of those last-mentioned was considerably under 100.

After some argument on this head on the first day of the trial, Sir Robert Smyth's counsel the next morning, without desiring any resolution or directions from the Committee on the subject, undertook to prove the rights of his voters.

The numbers on the poll were,

For Sir Robert Smyth	1488
For Mr. Johnes	980
<hr/>	
Majority for Sir Robert Smyth	508

In

In order to facilitate and shorten the business of the Committee, the agents on both * sides were directed to meet and examine the poll for Sir Robert Smyth, with the books of the corporation (A). This was done; and, in consequence of their joint examination, it was *agreed* that, of the votes for the fitting member,

I. A certain number was not to be found at all in the books.

II. That the names of a certain number were in the books, but that the descriptions added to those names in the books, and on the poll, were not the same. For instance, on the poll, *Fol. 71. N° 19*, was entered,

“ Amaziah Owen of Landiffilia, in the county of Carmarthen—Burgess of Cardigan.”

And the entry in the corporation-book which was fixed on by Sir Robert Smyth’s counsel, as corresponding to the same person, was,

“ Amaziah Owen, of the parish of *Cledy*, in the county of Pembroke.—Admitted on stamps, registered 26 October, 1774.”

III. That a certain number were only found in a list written in the book called the council-book. [188]

IV. That the admissions of a certain number were entered on stamps *during* the poll.

V. That the admissions of others were entered on stamps *after* the election.

VI. And of others within a year before the election.

VII. That the entries respecting a certain number

ber in the corporation-book, and on the poll, agreed both in the names and descriptions.

I. Of those seven different classes of voters, the first was given up by the counsel for the sitting member; and, concerning the others, questions arose, which were argued by the counsel, and separately determined by the Committee.

[189] II. With regard to the second class, on the part of Sir Robert Smyth, it was insisted, That an entry of admission in the corporation books being produced, when the name was the same with that entered on the poll, this ought to be taken as *prima facie* evidence of the identity of the person, so as to throw the *onus* of proving the contrary on the petitioners; and that a difference of description in the two entries, where the one description was not repugnant to the other, was not sufficient to destroy the presumption that the person was the same. That, in a great many instances, the same person was described, in the books, by his tenement, and, on the poll, by his parish; and that, where the parishes or counties mentioned in the books did not correspond with those on the poll, still there was no repugnance, because many of the voters might have changed their places of abode between the time of their admission and the last election.

The counsel for the petitioners, on the contrary, contended, That, though the difference of description might not be such as to be totally repugnant or irreconcilable, still it ought to be considered as
establishing

establishing a presumption that the persons were different, sufficient to render it necessary for the sitting member to prove the contrary. That the names being the same could never be taken as evidence of the identity of the person, in Wales, where it is well known there are always great numbers of persons of the same name, even in the same parish, and that there are not, perhaps, above a dozen of different names in a whole county.

After this point had been argued, the court was cleared, and when the counsel was called in again, they were informed by the Chairman, that the Committee had resolved,

That the counsel for the petitioners should make their objections to each individual vote; and that, when the description in the books should appear to differ from the description on the poll, it was incumbent on the counsel for the sitting member [191] to remove the objections, so as to reconcile the difference.

III. The next question was, Whether a list entered in the council-book of Cardigan, purporting to contain the names of burgessees whose presentments had been lost, should be read as evidence of the right of persons who had polled on the authority of that list.

Daniel Gwyn, the town-clerk of Cardigan being sworn, produced the council-book, in which there is the following entry :

" Cardigan Town and Liberties 1 Oct. 1739.

" At a Common Council holden and kept in

" and for the said town and liberties, at the dwell-

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L

" ling-house

" ling-house of John Rees of the said town, inn-
 " keeper, on Monday the first day of October,
 " 1739, before Thomas Davis, Esq; mayor, Tho-
 " mas Pryse, Esq; common-council man, Thomas
 [192] " Knolles, Esq; alderman, James Lewis, Esq; al-
 " derman, William Parry, Esq; alderman, Thomas
 " Lloyd, gent. alderman, Abel Griffith, gent.
 " alderman, Pritchard Pryse, gent. alderman, James
 " Lloyd, Esq; common-council man, and John
 " Lewis, Esq; alderman :"—

" It is likewise ordered, That Mr. Jacob Rice,
 " town-clerk of the said town, do, with all con-
 " venient speed, examine and inspect into the
 " suits, rolls, presentments, and other records of
 " this borough, and do thereout make and prepare
 " a new suit-roll, containing the names, additions,
 " and places of abode, of the burgeses of the
 " said town, and that he do take care to omit
 " thereout, all such persons as are dead ; and that
 " the same, or a true copy thereof, be afterwards
 " entered in this common-council book, for the
 " better knowledge and discovery of the burgeses,
 " for the time to come ; and thereby to prevent
 " any future imposition upon the mayor, alder-
 [193] " men, common-council men, and burgeses of
 " this corporation, by (1) personating other bur-
 " geses, or otherwise howsoever,"

Signed by the mayor and other persons above
 recited.

(1) To make this sense, or " By persons personating, (or per-
 at least grammar, it should be, " tending to be) burgeses."

In the same book, the list in question is written, bearing date in 1741, with this title :

“ A list of the burgesſes of this town of Cardigan, in the year 1741, alphabetically made, and herein entered, in purſuance of an order for that purpose, made by the mayor and council, upon Monday the first day of October, 1739.”

The list contains 1289 names, but only between 60 and 70 of Sir Robert Smyth's voters rested the evidence of their right upon it. It is not signed by any one,

Daniel Gwyn was called, on the part of the sitting member, and James Lloyd, Esq. of Maybus, on the part of the petitioners, the one to establish, the other to impeach, the credit and authority of the list. [194]

Gwyn said, he has been town-clerk of Cardigan ever since 1761. That he became acquainted with the corporation-books in 1756. There are no presentments of burgesſes to be found, from 1708 to 1756, except a few in 1727, and some in 1733, and 1734 (1); and no corporation-books from 1733 to 1756, except some court-rolls, and the council-book (2). The list has been in this book

(1) *Quære?* For a great many, bearing date in some of the intermediate years, were set forth in the brief for the petitioners. (2) In the clerk's minutes, he says, “ and an old book,” but he clearly meant, the council-book,

ever since it has been in his custody, and has never been altered. The book was produced, and referred to, at a contested election of a mayor, in 1767. Does not remember that* it was referred to or relied on, at that time, to settle any disputed fact. Does not know by whom the list was written. There was a contested election for Cardigan in 1741.

Mr. Lloyd said, He had had the council-book in his custody for years. That the list was written just before the election, in 1741, when there was a very warm contest between Mr. Pryse and Mr. Lloyd, his (the witness's) father-in law. His (the witness's) friends supported Mr. Pryse. The list was written at the house of the witness's uncle, who was in the council, but not town-clerk, by George Haynes Jones, who acted as clerk to his uncle. He (the witness) assisted, with one Davies, in reading over the names from some papers. Believes those papers were old and new presentments. Did not know where they were got from. They were in his uncle's possession. Does not remember that Jacob Rice, who was town-clerk, was present at his uncle's when the list was made. A great number of names were put in the list, of persons who had been presented, but had not been sworn in. He specified two. Some of those on the list he knew not to be burgessees at this day, particularly William Edwardes, Esq. member for Haverfordwest†. Believes that all the burgessees

[196]

† Since created Lord Kensington.

existing at the time, were put on the list. The list was made to serve Mr. Pryse's interest. It is written on the wrong end of the book, and not signed, as all other entries are. He attended at the election in 1741, and the list was not then referred to in any one instance. There was a contested election of a mayor in 1767, and a dispute which of two candidates had the majority of legal votes, but the list was not referred to, either on that occasion, or at the contested election for a member of Parliament in 1769. He attended at both.

At the time when the list was made, he was aged between 19 and 20. Was then totally unconnected and unacquainted with Lloyd the candidate, whose daughter he afterwards married: Was town-clerk of Cardigan, from 1742 to 1760: [197] He supported Johnes at the last election, and attended there on his behalf. The book containing the list is not considered as a corporation-book: The council is not an original or necessary part of the constitution of the borough. (Here he gave an account of the origin and nature of the council, agreeable to what has been stated in the beginning of the case). The book, as a mere council-book, is authentic, but the list is not signed, as all other entries in the book are. In 1745, he produced all the books and papers of the corporation to the House of Commons, in consequence of the Speaker's warrant, but having shown the council-book to the agents for both parties, they

they said it was not evidence, and desired him not to bring it up. Pryse's agent (although the list had been written to serve that interest) told him not to bring it up, as not being evidence. He never knew the council-book referred to, at any election.

- [198] On his cross examination, an affidavit of his was read, sworn in the court of King's Bench, in 1767, in a cause which took its rise from the contested election of a mayor in 1767. In that affidavit, the origin of the council is stated from the council-book, which he there refers to as authentic. After mentioning the entry of 9 May, 1653, for the establishment of a council (1), he says, in the affidavit, "And, in pursuance of such presentment, it has been *the constant custom and usage* of the said town and borough of Cardigan, &c."; and in another place, "He *constantly observed the said custom and usage, as it appeared to have been before used, by the said council-book.*" These words were relied on, as repugnant to what he swore before the Committee, concerning the council-book, but, when compared with the account here given of his evidence, which
- [199] I have taken from my own notes, and the minutes of the clerk, collated together, they appear perfectly consistent.

The town-clerk, on his examination, said, it had been the usual, though not the constant,

(1) *Supra*, p. 179.

practice; since he had been in his office, to administer the oaths of allegiance and supremacy, to the burgesses when admitted, till 1774; when there was an order that it should be dropt. He produced a list with those two oaths written at the top, and, underneath, a great number of names subscribed. Many of them, he said, were there when he was made town-clerk. The names of the burgesses who had been admitted, and had taken the oaths, during his time, had been entered in this list, of which there was a continuation on another paper. He said, he did not consider these as corporation-papers, and therefore had not produced them at the election. They were now called for on the part of the sitting member, with a view to corroborate the effect of the list in the council-book; but they were not examined or compared with it; and, in the argument, the counsel for the sitting member did not mention them, nor endeavour to derive any advantage from them. [200]

COUNSEL for the Petitioners.

It follows clearly from the account which has been given of the list in the council-book, that it cannot possibly be received as evidence. It was not written in pursuance of the order of the council, for, by that order, it ought to have been made out by the town-clerk (1). It bears date two years after the order, and appears to have been pri-

(1) *Vide* The Case of the King against Motherwell. Strange, p. 93.

vately prepared, on the eve of a contested election by an agent of one of the candidates, at his house in the country. It refers to no record, or corporation-book. It contains names of persons proved not to be burgessees, and, if examined, will

[201] be found to give a description of persons, not sufficient to distinguish those of the same name. Under the letter D, for example, there are no less than 19 David Thomas's. Under E, 9 Evan Jones's, and 8 or 10 Evan Griffiths's. There is no discrimination of any, except from their places of abode; and, as to a great number, even the place of abode is not mentioned. The book itself is not a corporation-book; and the list is not authenticated by any subscription, and was never relied on at any election.

The admission of such a loose entry of names, as evidence of the rights of burgessees, would tend to overturn one of the purposes of the stamp-laws; which was to establish regular authentic instruments, or an authentic repository, as the only way of securing against fraud, in questions concerning persons claiming the franchises of a corporation. Hitherto it has always been understood, that, since those laws were enacted, the only method by which a man ought to be allowed to prove himself a burgess, is to produce a stamped docket of his admission, if he was made

[202] free before 1765; or a stamped entry of such admission, if after that year. The only exceptions to this rule, are, either when it appears that, the claimant having been once possessed of such stamp-
ed

ed document, it has been destroyed, or lost, without any fault of his; or when, having been entitled to this evidence of his admission, he has been refused it by the fault of another.

COUNSEL for the sitting Member.

The Committee will lay out of the present question any observations that have been made on the contents of the list, since it was irregular, and improper, to enter into particular remarks upon what it contains, before the court has determined whether it shall or shall not be read as evidence.

Although the list does not, in words, refer to any presentments or books from which it was taken, yet it cannot be doubted but that it was made in consequence of the order of October, 1739; and Mr. Lloyd has acknowledged that it was copied from presentments. It was made, therefore, by the order of the governing part of the corporation; and, though not written by the hand of the town-clerk, the presentments from which it was taken must have been furnished by him. Hence he must be considered as having entrusted and employed Lloyd's uncle; and, by the maxim of law, "*qui facit per alium, facit per se.*" Mr. Lloyd, indeed, has said, that it was written to serve the purpose of an election, and that the names of persons not burgessees were inserted in it. But, at the same time, he owns that he himself was principally concerned in preparing it. What credit can be given to one who comes to prove criminality

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criminality in a transaction in which he was himself a principal actor?

[204] The list in question is to be considered as a copy of the presentments, and, as they are lost, is now the best evidence of the rights of the persons whose names are contained in it. It ought, therefore, to be admitted to be read as such—"Where," says Chief Baron Gilbert, in his Treatise upon Evidence, "a record is lost, a copy of it may be read, without swearing it a true copy; for the record is in the custody of the law, and not of the party, and therefore, if lost, there ought to be no injury arising to the party's private right, and consequently if it be lost, the copy must be admitted; without swearing any examination concerning it, since there is nothing with which the copy can be compared, and therefore it must be presumed true, without examination (1):"

[205] If, after all, there should be a doubt whether this list amounts to legal evidence of what it is offered to prove, the Committee will adopt a rule which is reasonable and just in itself, and was laid down by Lord Hardwicke in a corporation cause that came on before him (2), *viz.* Where there are doubts concerning the relevancy of evidence, the court ought to hear it, and judge of the relevancy afterwards (B).

(1) Gilb. Law of Evid. p. 22, 23.

(2) *Quere?*

In the reply, the counsel for the petitioners observed,

That, on the other side, they seemed to rest the admissibility of the list as evidence chiefly on this ground, that Mr. Lloyd's testimony was not to be believed, but that Mr. Lloyd had said nothing which was inconsistent or unbecoming a man of character and veracity. That there was no turpitude in the share which he, when a young man of nineteen, had taken, by the directions of his uncle, in preparing the list, since it was not his province to enquire into the use it was intended for, nor could he be presumed to be capable of judging at that time how far the fabrication of it was, or was not, culpable. That, in order to entitle the counsel for the sitting member to consider the list as a copy of legal documents which have been lost, they ought to prove that such documents once existed. That this had not been done. That it does not follow, because there is, during a certain period, a chasm in the books of the borough, that there once existed books corresponding to that period; and that, though Mr. Lloyd had said that the list was taken from presentments, it had not been shown that the persons named in those presentments had been enrolled in the leet-books as sworn and admitted.

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The Committee, after clearing the court, and deliberating among themselves, resolved,

That the list of 1741, as entered in the council-book, was not admissible as evidence.

IV. and V. The questions concerning the 4th and 5th class of votes (1), were taken up, and argued together.

[207] The objection, with regard to the first of them, was principally founded on evidence of a supposed irregularity in the entries on stamps which were made during the poll, *viz.* That they were not made by the town-clerk; and that proper enquiries were not made touching the identity of the persons, but that they were enrolled in the stamped corporation-book, and admitted to poll, if their names appeared in presentments with the letter S. subjoined.

The Committee, however, determined the abstract question, and subjoined a qualification to their resolution, in order to prevent any inference that they meant to tie up the counsel for the petitioners from calling in question the right of persons in the 4th class of voters, on the ground of their being in fact different people from those whose names appeared on the presentments.

The resolution and qualification, as delivered by the Chairman to the counsel were as follows :

Resolved, "That the voters whose admissions were stamped during the poll prior to their voting, are to be admitted as legal voters at this election."

(1) *Supra*, p. 188.

"The

C A R D I G A N.

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" The parties are to understand that this resolution goes merely to the legality of the stamping the admissions during the poll, before the voters had polled, and not to any other right whatsoever (C)."

The counsel for the petitioner contended, on the 5th head,

That, by the acts of Parliament, a man cannot give the instrument of his admission as a burgess in evidence, unless it be stamped, and that this being the best evidence, it must be proved that it has not been in his power to obtain it, otherwise no other proof, of an inferior sort, can be received. That, as the persons whose admissions were entered on stamps after they polled, did not give, and could not have given, this best evidence to the mayor, he ought to have rejected their votes. That, if he could not legally receive them at the poll, it was now the duty of the *Committee* to reject them, since, with regard to the right of each individual voter objected to, they were sitting in judgement on the very same cause which the mayor, as returning officer, decided upon at the election. [209]

On the part of the sitting member it was insisted,

That, where a stamp is required to authenticate any act, or instrument as evidence of such act, at whatever time the stamp is added, it operates retrospectively,

respectively, and authenticates the instrument from the beginning. That in cases of admission, as soon as the admission is entered on stamps, the stamps confirm the pre-existing right, and substantiate every act of the burgess in the interval from his admission. That, when an ejectment has been brought, and the plaintiff non-suited, because the deed on which he founds his title was not stamped, on the trial of a new ejectment, if the deed has been stamped in the interval, it may be given in evidence, and will prove the title as accruing from the first date of the deed, not from the time of stamping. That, if an order of Justices has been made for removing a pauper, who

[210] claims his settlement under an indenture of apprenticeship, because the indenture was not stamped, on an appeal, if it is stamped in the interval, the order will be quashed*.

That there are many instances where, when two stamps are requisite to a deed, and the deed has been offered in evidence having but one, the court has directed that it should be sent out to have the other added immediately, and then has received it in evidence. That, by the indemnification act of 14 Geo. III. cap. 47. § 3. the voters in question, (though, at the time of being admitted, they neglected to enter their admissions on stamps,) having done so within the time limited in the statute, were entitled to all the benefit and advantages accruing

* *Quare?*

to them as freemen, in like manner as if their admissions had been stamped *ab initio*.

The section of the statute referred to, was read, and is as follows (1).

“ And whereas the appointments of divers [211]
 “ clerks of the peace, town-clerks, and other public officers, and the admissions of divers members of cities, corporations and borough-towns, or the entries of such admissions in the court-books, rolls, or records of such cities, corporations, and borough-towns, which, by several acts of Parliament, are required to be stamped, may not have been provided, or the same not stamped, or may have been lost or mislaid, be it further enacted, That, for the relief of such persons whose appointments or admissions, or the entries of whose admissions, as aforesaid, may not have been provided, or not duly stamped, or where the same have been lost or mislaid, it shall and may be lawful to and for such persons, on or before the 25th day of December, one thousand seven hundred and seventy-five, to provide, or cause to be provided, appointments and admissions, or entries of admissions, as aforesaid, [212]
 “ duly stamped, or, in such cases where such appointments, admissions, or entries of admissions,

(1) It is printed in Mr. Pickering's *essays* edition of the Statutes. In the 4to edition, nothing but the title is given, as a similar act passes, I believe, annually.

" as aforesaid, have been made or provided, but
 " have not been duly stamped, to produce such
 " appointments, admissions, or entries of admis-
 " sion as aforesaid, to the commissioners appointed
 " to inspect and manage the revenues of the stamp-
 " duties, to be duly stamped; which such com-
 " missioners are hereby authorized, empowered, and
 " required to duly stamp, on payment of the du-
 " ties first payable, or to have been paid on such
 " appointments, admissions, or entries of ad-
 " missions as aforesaid, without any fine or for-
 " feiture thereon; and such persons so provid-
 " ing appointments, admissions, or entries of
 " admissions as aforesaid, duly stamped, or pro-
 " curing the same to be duly stamped in man-
 " ner aforesaid, are and shall be hereby *confirmed*
 " and qualified to act as clerk of the peace, town-
 " clerk, or other public officer, or member or
 " members, officer or officers, of such cities, cor-
 " porations and borough-towns respectively, to all
 [213] " intents and purposes, and shall and may hold
 " and enjoy, and execute such office or offices, into
 " which he or they has or have been elected, not-
 " withstanding his or their omission, or the omission
 " of any of their predecessors, in such cities, cor-
 " porations, or borough-towns, as aforesaid; and
 " shall be indemnified and discharged of and from
 " all incapacities, disabilities, forfeitures, penal-
 " ties, and damages by reason of any such omis-
 " sion; and none of his or their acts shall be ques-
 " tioned or avoided by reason of the same."

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The counsel for the petitioners in reply, admitted,

That, where a stamp is required, when once the instrument is stamped, it authenticates and gives validity retrospectively to acts done before the stamp was added. That, therefore, on a new election, the burgessees of Cardigan whose admissions were entered on stamps *after* the last poll, might give such admissions in evidence to shew that their right had accrued *before* the last poll. But they argued that, as those men were not possessed of this legal evidence of their right at the last poll, the Committee, who were now trying whether they ought to have been admitted to vote on that occasion, could not proceed on the supposition of their having been then possessed of such evidence, and must therefore consider them as not having been entitled to vote at that time. That the case of a second ejectment is not similar to the present, a second ejectment being entirely a new cause, and like a second election, where the parties, if they are become possessed of new evidence, may avail themselves of it. That a new trial was never granted in an ejectment cause, because a deed, which could not be produced on the first trial, as not being stamped, had been stamped since such trial. That, in the case put of the removal of a pauper, the *original* trial of the cause, as to the parish appealing, is, in truth, at the sessions, as the parish is not till then heard, and that, to be sure,

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the first time such parish is heard, they may avail themselves of such legal evidence as they are then possessed of, in the same manner as, in a trial in ejectment, a party may avail himself of a deed stamped after the action brought, but before the trial. That the case is the same when, a second stamp being necessary, it is added before the deed is given in evidence. That those cases did not apply here, since the only question before the Committee was, Whether certain votes received by the mayor, ought to have been received *by him*? That, if they ought not, the Committee could not allow them as legal votes at the last election.

The Committee resolved,

That persons whose admissions were stamped after their votes were given, were not to be allowed as legal voters at the last election (D.)

[216] VI. The sixth class of voters for the sitting member were objected to, as falling within the disqualification of the statute of 3 Geo. III. called the Durham act. ➤ This objection, it should seem, ought to have been made before the two questions immediately preceding, because, if it had been determined in favour of the petitioners, the two foregoing questions could not have arisen.

The words of the statute are these :

“ No person whatsoever claiming as a freeman
 “ to vote at any election of members to serve in
 “ Parlia-

" Parliament for any city, town, port, or borough
 " in England, Wales, and the town of Berwick
 " upon Tweed; where such voter's right of
 " voting is as a freeman only, shall be admitted to give his vote at such election, unless
 " such person *shall have been admitted* to the freedom of such city, town, or borough, twelve calendar months before the first day of such election (E); and if any person shall presume to give his vote as a freeman at any election of members to serve in Parliament, contrary to the true intent and meaning of this act, he shall, for every such offence, forfeit and pay the sum of one hundred pounds to him, her, or them who shall inform or sue for the same; and the vote given by such person shall be void and of no effect.

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" Provided always, That nothing herein contained shall extend; or be construed to extend, to any person entitled to his freedom by birth, marriage, or servitude, according to the custom or usage of such city, town, port, or borough (1)."

The counsel for the petitioners contended,

That the *admission* meant by the statute is the admission upon stamps. That, till such admission on stamps, the party is to be considered as having only an inchoate right to his freedom, not as being

(1) 3 Geo. III. cap. 15. § 1.

a complete freeman; and that, as the titles of birth, marriage, or servitude, are the only inchoate rights excepted out of the disqualifying clause, persons entitled by any other sort of inchoate right, as presentment or election, are within the disquali-

[218] fication. They said, That, at least, the words of the statute are capable of this interpretation. That there could be no inconvenience, and there would be many advantages, from so construing it. That persons chosen burgessees have it in their power to complete their right by demanding to be admitted upon stamps as soon as they are chosen. That the legislature had two purposes in making the stamp laws; one, that the stamped instruments might be authentic documents of the matter contained in them; the other, to increase the public revenues by the stamp duties. That both those ends would be, in a great measure, frustrated as to admission to the freedom of a borough, if it were to be holden that a man may be a complete burgess without any stamped admission, and that it is sufficient if he procure such stamped admission the instant before it becomes necessary for him to produce it as evidence of his right. That, if the law were to be so understood, burgessees would never think of having

[219] stamped admissions, unless they should find them necessary for a sudden occasion, so that many would die without ever having been admitted upon stamps, by which means the revenue would be defrauded, and the legal evidence of such persons having been freemen would be lost.

On the part of the sitting member it was answered,

“ That, when a burgher is elected, or *presented*, and then *sworn in*, his right is complete. That the swearing in, is the sort of admission meant by the statute. That, if the doctrine of the counsel for the petitioner were true, it would follow, that, before the stamp acts, there never had been such a thing as a complete right of freedom in a borough. That, from the words of the last stamp act, it is plain, that the admission is considered as a thing distinct from, and previous to, the entry thereof upon stamps. The words are, “ For every “ *skin, &c. on which shall be engrossed, &c. in the* “ *court-book, roll, or record, of any corporation or* “ *company, any entry, minute, or memorandum of any* [220] “ *admission into any corporation or company, the* “ *sum of two shillings.*”

The Committee resolved,

That it is not necessary, by the statute of 3 Geo. III. for freemen, whose right in every other respect is complete a year before an election, to have their admissions entered on stamps twelve calendar months before, in order to qualify them to vote at such election (D.)

VII. As to the seventh class of voters for the sitting member, although both the names and descriptions in the corporation-books agreed with those on the poll, the counsel for the petitioners

contended, That, as there are such numbers of persons of the same name in Wales, and, as Mr. Johnes's agents were not permitted to enquire into the identity of those voters during the poll, it was now the business of the counsel for Sir Robert Smyth to prove their indentity.

The Committee, however, resolved,

[221] That, as to this class of voters, the *onus* of disproving the identity of the persons lay upon the counsel for the petitioners.

In consequence of the foregoing resolutions of the Committee, lists were prepared, by the agents on each side, of the number of votes which were disqualified by such of them as were in favour of the petitioners; and, (in consequence of this sort of scrutiny) the counsel for Sir Robert Smyth, on the 9th day of the trial, admitted, that, as the poll then stood, there was a majority of 58 in favour of Mr. Johnes.

Upon this, Smyth's counsel endeavoured by evidence to show, That the conduct of Johnes's agents, before and during the election, had been such, and that the poll had been so carried on, on his part, that there was the greatest reason to believe, that those persons who had voted for him, in consequence of stamped admissions in the books, were not the persons who really had been admitted, but that they were men who had falsely personated those who were entitled under those admissions:

That his counsel, therefore, ought to be put upon

upon identifying his votes, in like manner as the counsel for the sitting member had been obliged to do.

The greatest part of the voters for Mr. Johnes, were burgesses of Lampeter.

By the statute of 3 Geo. III. cap. 15. it is enacted, "That the mayor, bailiff, town-clerk, or
 " other officers, of any corporation, having the custody of, or power over, the records of the same,
 " shall, *upon the demand* of any candidate, or his
 " agent, or any two freemen, on the payment of
 " one shilling, permit such candidate, agent, or
 " freemen, between the hours of nine in the morning and three in the afternoon, *at any time before*,
 " and within one month after, an election, to inspect the books and papers wherein the admission
 " of freemen shall be entered." A penalty of 100*l.* is imposed on the officers above specified for every refusal (1).

It appeared, That Mr. Lewis Rogers, an attorney, and agent for Sir Robert Smyth, went to Lampeter several times, between the 5th of October and the time of the election, to demand an inspection of the corporation-books, of the port-reeve. That he never found him at home, and that he never enquired for *him* any where else. That he went to Mr. Adams's house, (who is lord of the manor of Lampeter,) to ask for the books, thinking they might be there. That he there enquired for

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(1) § 4.

Mr. Adams's agent, (one Jenkins) and for David Davies, the town-clerk of Lampeter, and was told, they were not there. That he left his name, and the business, he came upon, but not in writing. One Brookman, who had been butler to Mr. Adams in October, 1774, said, That *he* went to the door when Rogers asked for Jenkins, and that he refused him admittance. That both Mr. Adams and Jenkins had told him, that neither Jenkins, the town-clerk, nor the port-reeve, were to be seen by any body. That the port-reeve was often at [224] Mr. Adams's house, in the month of October. That both Mr. Johnes and his father were there at different times, when the port-reeve was also there. That the gentlemen were generally in the same room together, and seldom went out. That they had stamped books before them, which they said were the Lampeter books. That he had seen them writing in those books, but could not say what they were writing. That Mr. Jenkins, the town-clerk, and the port-reeve, had all said to him, that the whole election depended on *themselves*, and the books being kept secret.

It did not appear that the books had ever been demanded of the port-reeve, personally, at his own house.

There were marks of rasures in many parts of those Lampeter books, and it appeared, that, when objections were made to the identity of Mr. Johnes's voters, on the ground of a difference between the accounts they gave of *themselves*, and the descriptions

tions in the books, or because of rasures in the entries of their admissions, his agents, particularly Mr. Watkins, answered, that *there could be no averment against a record*, and that parole evidence could not be received to contradict a record. This answer was often made during the course of the election; but Mr. Watkins, in his evidence, said, that he had only made such answer in cases like the following, viz. where a voter declared that he had been admitted in April, and, by the entry of his admission, it appeared to have been in May. Several witnesses said, That notwithstanding, and after, those answers by Mr. Johnes's agents, many questions were put to his voters both by his own agents, and those of Sir Robert Smyth, to ascertain their identity. That this point was strictly scrutinized. That Sir Robert Smyth's people did not offer any evidence to disprove the identity as established by the examination of the voters themselves. Mr. Watkins said, he particularly recollected, that several had been rejected, because the parole account they gave, of the dates of their admissions, differed from the entries in the books; and that none seemed to be received to poll, unless the mayor was satisfied of their right, nor until the sitting member's agents, being asked if they were satisfied, said they were. [226]

The Committee, after hearing the counsel on both sides on this point, resolved,

That, as the identity of Mr. Johnes's voters had been

been scrutinized at the poll, it was not incumbent on his counsel to identify them before the Committee (D.)

After this last resolution was declared, the counsel for the sitting member acquainted the Committee, that they had nothing farther to offer. The poll therefore remained, according to their admission, with a majority of 58 in favour of Mr. Johnes.

[227] The reader will have observed, that all the questions in this cause, except those concerning the construction of the stamp laws, and of the Durham act, were mere general points of evidence. There were, besides, two particular questions of evidence determined in the course of the cause.

1. Mr. Watkins, having stated, in his evidence before the Committee, the arguments he had urged with the mayor against the rules laid down for the conduct of the poll, was going on to mention the answer made by Mr. Cuthbert, counsel for Sir Robert Smyth, to those arguments.

This was objected to.

It was said, that the arguments of counsel could be no evidence of the fact, and that the mayor could not be affected by what a gentleman who was counsel for one of the parties might have said.

The counsel for the petitioners contended, That whatever a third person said of the mayor in his presence, was evidence of the mayor's conduct on that particular occasion.

The

The Committee, after deliberation, came to the following resolution ;

Resolved, That the answers given by Mr. Cuthbert, to the arguments of Mr. Watkins, are not admissible evidence.

2. When the Committee had determined, that the counsel for the sitting member should identify those of his voters whose description on the poll differed from that in the book, they were going to call Mr. Colby, the mayor, to prove the identity of one of those voters. [228]

On the part of the petitioners it was objected,

That Mr. Colby was criminally charged in the petitions. That the tendency of his evidence must be to acquit himself, and, consequently, that he was not an admissible witness.

It was answered,

That nothing criminal had been proved against the mayor; for that it had appeared that, in conducting the poll, he had adopted the method which had been followed at the former election.

The Committee, after deliberation, resolved,

That the mayor could not be admitted to give evidence (1).

↳ Lewis Rogers was not admitted to give evidence, because he had been in the room during the examination of other witnesses, and could not say he was an agent on the trial of the cause.— [229]

(1) *Vide infra*, Case of Worcester.

CASE XXIX.

The rule is always made with an exception as to agents.

On Thursday, the 7th of December, the Committee, by their Chairman, informed the House, that they had determined,

That Thomas Johnes, the younger, Esq; was duly elected, and ought to have been returned (1).

(1) Votes, p. 166, 167.

N O T E S

ON THE CASE OF

C A R D I G A N.

PAGE 187. (A.) The great loss of time, and the confusion, occasioned by the ignorance in which the parties were, till the cause came on, with regard to the different heads of objection made by the opposite side, and the numbers of voters objected to under each head, were sensibly felt in this case, and in the following case of Worcester. An easy remedy might be provided. By extending the resolution mentioned in the Introduction, vol. i. p. 47. N° v. to boroughs, or by making another similar resolution with regard to them, all the scrutiny and examination, which, being now carried on by the agents on each side during the trial, clogs and retards the proceedings of Committees in cases where the voters are numerous and the objections various, would be anticipated. The parties would come prepared with the exact knowledge of what they meant to admit, and what remained to be litigated.

Note
(A.)

The enormous length of time which the Worcester cause employed, and which I fear may beget, in some, a reluctance to take the chance of serving on Committees when the cases

are

Note
(A.)

are thought to be of the same sort, has satisfied several members of Parliament of the expediency of what I now propose. I believe it has been mentioned in the House that such an amendment of the former resolution, or such new resolution, will be moved.—As, in all boroughs where honorary and non-resident freemen vote, the voters *may*, and in some, I believe, already *do*, exceed, in number, those of any shire, it is obvious, that the reasons which gave rise to the rule respecting counties, are equally strong with regard to such boroughs*.

Note
(B.)

P. 205. (B.) The rules concerning the admissibility of evidence have been established chiefly with a view to those tribunals, where the departments of trying the facts of causes, and of expounding, and deciding upon, the law, are entrusted to different persons. When those two provinces centre in the same judges, as in Election Committees, the same strictness hardly seems to be necessary. Suppose a question upon the admissibility of evidence is raised before a Committee; and they are required to decide upon it, their duty then is, to determine, in the character of judges of the law, whether it is proper to lay the evidence offered, and objected to, before themselves, in their other capacity of jurymen. Now, in truth, almost all the inconvenience which may be apprehended from an improper impression, and prejudice, occasioned by illegal evidence, is, in such case, already incurred, by its being stated as what is to be proved, before it is actually produced; and sworn to, in the regular form. There is another reason why it is not, perhaps, essential to be so scrupulous in the case of Committees, as with regard to common juries. The law supposes Committees to be acquainted with the nature of legal evidence, and therefore it must be presumed, that, if they do admit evidence which when they hear it, turns out to

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* [Vide 1 Lud. Pref. p. xxx. 2 Lud. p. 576. Note (A.)]

be illegal, they will lay no stress upon it in forming their verdict*. Juries, on the contrary, by intendment of law, are considered as *unacquainted* with the nature of legal evidence.

Note
(B.)

It has often occurred to me, that, in trials at *nisi prius*; when evidence is objected to, there is an impropriety in allowing the counsel who offers it, to state what he means to prove in the hearing of the jury, and this for the reason already mentioned; especially as jurymen are too apt to infer, that evidence so offered must be both true, and fatal to the party who objects to it, merely because it is objected to. Perhaps it would be an improvement, when questions of admissibility are raised, that the jury, as well as the witnesses, should withdraw, till the point was argued and decided.

P. 208. (C.) The meaning of the resolution, coupled with the explanation, is sufficiently clear; but it might perhaps have been more accurately expressed in one resolution. Thus;

Note
(C.)

Resolved, " That persons whose admissions were entered " on stamps *before* they voted, but *after* the poll began, " were not, *on that account*, disqualified from voting at the " last election."

P. 215. 220. 226. (D.) I have ventured to throw these three resolutions into a more accurate and technical form, than that in which they were delivered; but, in order to be sure that I had not mistaken their meaning, I was not satisfied with gathering it from the conduct of the parties, and the Committee, in consequence of the resolutions; I talked the matter over several times, both with the Chairman, and

Note
(D.)
[233]

* [Vide 2 Vern. 98. 337. 625. 180. *Meres et al. v. Ansell et al.*
Harvey v. Harvey, 2 Ch. Ca. 3 Wils. 295.]

Note
(D.)

the counsel on both sides. To convince the reader of the propriety of what I have done, it will be sufficient to state the words of one of the resolutions, as communicated to the counsel, and entered in the minutes;—of *that*, for example, relative to the sixth class of voters. (*supra*, p. 220.)

“Resolved, “That [persons whose*] admissions [were*] stamped within twelve calendar months before the election, are legal voters, within the meaning of the act of 3 Geo. III.”

Now it could never be the meaning of the Committee that such persons were legal voters whatever other defects there might be in their titles, yet the words certainly express that proposition. A qualification like that added to the resolution concerning the fourth class (*supra*, p. 208.) was *understood* to be tacitly annexed to this.—The inaccuracy arose in a manner very natural. It was first proposed (after the counsel had withdrawn) to put the question in the negative, thus, “Resolved, That, &c. are *not* legal voters.” This, in point of form, would have been proper; but, when it appeared that the majority of the Committee were for over-ruling the objection, instead of new framing the question, it was only altered, by striking out the word “*not*.”

[234]

Note
(E.)

P. 216. (E.) It is no wonder that a want of precision should sometimes be observable in the manner of wording *resolutions* of Committees, for they are often made without premeditation, and, if the meaning of the court is sufficiently understood, it is not of much importance to the *particular cause* (though it is of importance, if the resolution is to be of authority, in *subsequent cases*) that it should be expressed with a critical nicety. Inaccuracies in *statutes* are

* [The words included between these marks { } are not in the entry in the minutes, but are absolutely necessary to make the sentence complete.]

not so pardonable; yet, they are too common. The following is one of many instances which might be produced :

By the statute of 18 Geo. II. cap. 18. the freeholders oath now in use was introduced.—By that oath, which every voter at a county election is obliged to take, if required by a candidate or any other voter, he is to swear that he has been in the actual possession or receipt of the rents and profits of his freehold *above twelve kalendar months*; (unless it came to him in some of the ways there specified). By sect. 5. it is enacted, in like manner, that no person shall vote, without having been in actual possession, &c. *above twelve kalendar months*; unless he is within some of the exceptions. There is a similar oath and provision in the stat. of 19 Geo. II. cap. 28, relative to freeholders in counties corporate, and the words concerning the twelve kalendar months are exactly the same. Can any one clearly decide whether the twelve months are to be computed backwards, from the day when the particular voter polls, or from the day when the election commenced? The interpretation, according as it should happen to be one way or the other, might, on many occasions, decide entirely the merits of an election; for it may happen that many persons who have been freeholders only eleven months at the beginning of the poll, shall have been in possession above twelve months at the time when they come to vote. The most obvious construction* is, that the computation is to be from the day when the voter takes the oath, and gives his vote. Yet we can hardly presume that the legislature meant to draw *one* line with regard to occasional freeholders in counties, and counties corporate, and *another* with regard to occasional freemen in boroughs †; and, by the clause of 3 Geo. III. cap. 15. cited in

[235]

* [And (being in the case of a restrictive law) the construction most consonant to established rules.]

† [Much less can we suppose for counties in right of rent-charges and

Note
(E.)

in that part of the text to which this note refers, a freeman (who is not within the exceptions of the act) in order to be entitled to vote, must have been possessed of his franchise twelve kalendar months "before the *first day* of the election."

and annuities, and by 3 Geo. III. must have been registered twelve c. 24. the memorials of rent- kalendar months "before the charges and annuities, (§ 3) and " *first day* of the election."] the assignments thereof, (§ 4)

XXX.

THE

C A S E

Of the CITY of

W O R C E S T E R,

In the County of WORCESTER.

On Friday the 26th of January, 1776, (which was the second day of the meeting of the House after the Christmas holidays) the Committee for trying this cause was to have been ballotted for, but, as there were not 100 members present, either on that day, or the day following, the House adjourned, and the ballot did not take place till the Monday.

On Monday the 29th of January, the Committee was chosen, and consisted of the following Gentlemen :

Sir Adam Ferguson, Bart. Chairman	} Members for	Ayrshire.
Sir Walden Hanmer, Bart. - -		Sudbury.
Francis Annesley, Esq. - - -		Reading.
Matthew Wyldbore, Esq. - - -		Peterborough.
Abel Smith, Esq. - - - - -		Aldbro', Yorksh.
Tho. Edwards Freeman, Esq. -		Steynning.
John Rogers, Esq. - - - - -		West Loo.
John Rolle Walter, Esq. - - -		Exeter.
Thomas De Grey, jun. Esq. - -		Tamworth.
George Medley, Esq. - - - - -		Seaford.
Cha. Warwick Bampfiele, Esq. -		Exeter.
John Tempeft, Esq. - - - - -		Durham.
Richard Crofts, Esq. - - - - -		Cambridge Univ.
NOMINEES,		
Sir George Saville, Bart. - - -	Yorkshire.	
Charles Mellish, Esq. - - - - -	Pontefract.	

PETITIONER :

Sir Watkin Lewes, Knight.

Sitting Members :

John Walth, Esq. Thomas Bates Rous, Esq.

COUNSEL for the Petitioner :

Mr. Kenyon, Mr. Hardinge, and (in Mr. Kenyon's absence)
Mr. Arden.

For Mr. Walth :

Mr. Mansfield, Mr. Serjeant Grose, and (in Mr. Mansfield's absence) Mr. Morris; and afterwards (in *his* absence)
Mr. Macdonald.

For Mr. Rous :

Mr. Lee, Mr. Cooper.

☞ The petitioner's counsel objected to the appearance of the two sitting members as two distinct parties, by separate counsel. This produced a debate in the House, but it was allowed without a division. *Vide supra*, vol. i. p. 85 to 87: (Note S.)

THE
C A S E
Of the CITY of
W O R C E S T E R.

ON Tuesday, the 30th of January, the Committee met, and the petition was read. It set forth ;

1. That the two sitting members had been guilty of bribery, by themselves and agents.

2. That the mayor and several aldermen, and justices of the city, and many of the common council, had acted as agents of, and had threatened, canvassed, and solicited great numbers of freemen to vote for, the sitting members, and had promised that they should be set down as constables, and have a certain reward for their votes; that they had bribed, and attempted to bribe with money, and otherwise corrupt, a great many freemen, to induce them to vote for Mr. Walsh and Mr. [240]

Rous, or one of them; and were guilty of divers other corrupt and illegal practices for the same purpose.

3. That, by those means, and other undue influence, the mayor, aldermen, and common council, as agents for the sitting members, procured many to vote for them, who otherwise would have voted for the petitioner.

4. That the mayor, several of the aldermen and justices, and the town-clerk, for several days before, and during the election, had met together, and had appointed, and sworn in, many freemen (to the number, as the petitioner believed, of 300 and upwards,) to be constables, under a promise from those persons, that they would vote for Mr. Walsh and Mr. Rous, for which they were to have certain rewards in money; and that this money [241] was afterwards paid to them out of the funds of the city, or by the two sitting members.

5. That a peer and lord of Parliament had, by himself and his agents, interfered in the election, by publicly canvassing and soliciting votes on behalf of Mr. Walsh, and by using threats to intimidate freemen from voting for the petitioner in violation of the privileges of the House, and the freedom of election, and to the infringement of the rights of the Commons of Great Britain.

6. That the sheriff and returning officer of the city, (Worcester being a county corporate, and the sheriff the returning officer) had rejected good votes tendered for the petitioner; and had admitted

mitted persons not qualified, to vote for the sitting members.

7. That, by these and other illegal means, the sitting members had procured a majority on the poll; but that the majority of legal votes was in favour of the petitioner (1).

The last determination of the right of election [242] was next read; and then the standing order of 16 Jan. 1775-6 (2).

The last determination is as follows:

11 Feb. 1747-8. Resolved, "That the right of election of citizens to serve in Parliament for the city of Worcester, is in the citizens of the said city, not receiving alms, and admitted to their freedom, by birth or servitude, or by redemption, in order to trade within the said city (3)."

The election began on Wednesday, the 12th of October, 1774, and ended on Tuesday, the 18th.

The numbers on the poll were,

For Mr. Rous	- - - - -	981
For Mr. Walfh	- - - - -	893
For Sir Watkin Lewes	- - - - -	736
For Mr. Bearcroft	- - - - -	312

So that Mr. Rous had a majority of 245, and Mr. Walfh of 157, over Sir Watkin Lewes.

(1) Votes, 31 Oct. 1775. (3) Journ. vol. xxv. p. 510, p. 31, 32. col. 1.

(2) *Supra*, vol. i. p. 99, 100.

The objects of the petitioner were ;

I. To prove that bribery had been committed by the sitting members, or their agents ; and thereby to make the election void, as to them.

II. To disqualify such a number of the voters for the sitting members, and to add such a number to the poll for the petitioner, as to leave a majority in his favour, and entitle him to be declared duly elected.

III. To induce the Committee to make a special report to the House of the various matters particularly alleged in the petition, against the sitting members, the corporation, the returning officer, the peer whose influence was complained of, and the corrupted voters.

Ist Head.] On the first head witnesses were produced, who swore to positive acts of bribery, and promises, by Mr. Walsh himself, and by his agents. There was no attempt to charge Mr. Rous *directly*; but it was contended, that Mr. Walsh and his agents were to be considered as agents for Mr. Rous, who, therefore, must be affected by what they had done.

[244]

IId Head.] On the second head there were the following objections, to different classes of voters for the sitting members.

1. To a great number, That their votes had been procured by money or promises. This was the main point of the case, being sufficient, if proved to the full extent, to have given the petitioner a majority over both the sitting members.

By

By a charter of James I. the city of Worcester, which was before that time, and continues to be, a county of itself, is incorporated by the name of the mayor, aldermen, and citizens of the city of Worcester. There is a common council composed of two bodies, one of twenty-four, the other of forty-eight, making together seventy-two common-council men. The number of citizens is indefinite. The mayor and six aldermen, are chosen annually out of the twenty-four, by the seventy-two. Those six aldermen, and the mayor, are, by their offices, the justices of the peace for the city. [245]

The day before the election began, the common council, the greater part of whom were in the interest of the sitting members, made the following resolution and order:

11 Oct. 1774. Resolved, "That it be recommended to the mayor and justices to appoint such a number of constables as they shall judge proper, to preserve the peace, during the election of members to represent this city in Parliament."

Ordered, "That the expences attending such appointment be defrayed by this corporation."

Accordingly, about three hundred were sworn in, and they received one shilling and six-pence a day from the chamberlain, out of the money of the corporation, for a week. All the constables, except about ten or twelve, were freemen; and voted for the sitting members. At former elections it had been usual to appoint a certain number of special

special constables to keep the peace; but they were not so numerous as at this election, and they were paid in equal proportions by the candidates, and not by the corporation. There were several of the persons appointed on the present occasion lame, or so infirm as to be incapable of doing the duty of the office; insomuch that, a riot having happened during the course of the poll, it was thought necessary to swear in about ten or twelve able-bodied watermen. These watermen were the only constables who were not freemen.

From the circumstances just stated, it was contended; That the appointment of so many freemen to be constables, was only colourable. That, being all voters, and having voted for the sitting members, the money paid to them was to be considered as bribes given them by the corporation, who were the agents of Walsh and Rous. That all the votes of the constables, therefore, ought to be struck off the poll.

[247] Besides this, there were witnesses who said, that two agents of Walsh, in their presence, had offered, on the 30th of September, to a company of about 25 freemen, to make them constables if they would vote for Walsh and Rous, and said they should have a guinea from each candidate; and that many of them accepted on that condition. One of the witnesses said, that he asked whether he might not be half a constable if he polled for Walsh, and that he was told he could not be a constable unless he would vote for both. Several persons swore to
decla-

declarations of voters who were made constables, that they had received money from, or on the behalf of, Walsh, and that they were promised more.

There was a considerable number of out-voters, resident at London, Birmingham, Kidderminster, and other places, whose expences were defrayed by the sitting members. It was also sworn, that they were promised money for their trouble, by the agents. Many declared that they had voted in the *expectation* of a reward. Some, that they had received the money, after they had polled.

2. Another objection was, That a great number [248] of the voters for Walsh and Rous did not appear to be enrolled in the corporation-books. When the counsel came to this part of the case, as there had been no previous examination of the books by the agents on both sides, (1) the Committee directed, that the books should be delivered to the agents for the petitioner, for the purpose of searching them; and that they should report to the Committee, on the day following, the result of such search. Accordingly, Lord Mahon, (who appeared as a friend of the petitioner) attended by seven or eight clerks, sat up all night, comparing the list for the voters for Walsh and Rous with the corporation-books; and he, as well as the clerks who had been employed with him, gave an account, next morning, of the method they had pursued, and that they had discovered, that there were 114 per-

(1) *Vide supra*, p. 230, 231. Case of Cardigan, Note (A.)

sons on the poll for the fitting members whose names were not to be found in * any of the corporation-books; besides 39 who were described differently, in the books, and on the poll, as to their profession. The manner in which they had examined the books was this: An alphabetical list of all the voters for the fitting members was subdivided into six smaller lists. The names beginning with the letters A. B. and C. being contained in one, were delivered to one clerk, those beginning with D. E. F. G. to another, and so on. Then a person, assisted by Lord Mahon, read over all the entries in the books, from the beginning to the end. Whenever he came to the name of any person which was contained in one of the lists, the clerk who had the list, struck his pen through the name. Having gone through the whole in this way, there remained 114 names in their different lists which were not struck out, and which therefore, they had not found entered in the books. Afterwards, however, on re-examination of the books by the agents on both sides, the number of [250] persons not enrolled was reduced, first to 61, and then to 19. The 19 were given up by the counsel for the fitting members.

It appeared, that there had been great irregularity with regard to the enrolment of freemen. Before the statute of 5 Geo. III. (1) it had been the practice to enrol the freemen on a stamped

(1) Cap. 46. *Vide supra*, vol. ii. p. 158 to 160.

book, not to give them stamped docketts of their admissions, as in other boroughs. But they received on their admission what they call *Copies*; which contain the freeman's oath in print, and, upon the top or bottom of the oath, in the hand of the under clerk of the deputy town-clerk, a memorandum of the name of the freeman, and the date of his admission and swearing in. The present deputy town-clerk had enrolled a great many who had produced *copies* of this sort, on which the admissions were mentioned as prior to his coming into the office. He said, he had been informed by his predecessor, that many had been admitted, and had received *copies*, whom he had neglected to enrol, and that he had desired him to enrol them, and promised that he would pay him for it, which he had done; and that he had enrolled them according to the dates on the *copies*. He had also enrolled others, who had no *copies*, on evidence of their having exercised the franchises of freemen; or, on the testimony of persons who had been present at former elections where their titles were strictly scrutinized.

[251]

3. A third objection was, That certain voters had been made freemen by redemption, *but not in order to trade within the city*.

4. A fourth, That some, who claimed as freemen by redemption, had only paid a colourable trifling sum, and were to be considered as mere honorary freemen.—The counsel for the petitioner endeavoured to establish, that there is a certain valuable

con-

consideration or fine (20*l.*) paid, when the freedom of the city is really and *bonâ fide* acquired by redemption. But this was not much insisted on.

[252] 5. It seems honorary freemen are entitled to exercise every franchise, except that of voting in elections of members of Parliament. The sons of some honorary freemen, traders in the city, had been admitted to their freedom, as having a right by birth, and some under this description had been received on the poll for the sitting members. These were objected to. It was contended, that the father could not transmit to the son, by descent, a title which was not in himself.

6. Two voters were objected to, who live in houses which are in the gift of six masters, or guardians, members of the corporation, and who pay no rent, but receive 1*s.* 6*d.* a year. It was argued, that this was a disqualification, under the words of the last determination, being in the nature of *alms*.—It did not appear, that, in former times, the votes of persons living in those houses, had been objected to, or rejected.

[253] Nineteen persons, who, before the election, had claimed to be admitted to their freedom, as entitled by servitude, offering to prove the execution of their indentures, and that they had served their time, and who were refused, tendered their votes for Sir Watkin Lewes, and were rejected (1). The ground was this: They were apprentices to the

(1) *Quære?*

corporation for the manufacture of Worcester China, which is carried on without the city; and the mayor and aldermen, who have the right of admitting freemen claiming by title, contended, that the service which gives a title, cannot be to a corporate body, and that it must be within the city.—Steel, one of the 19, sued out a mandamus, which was tried after the election, and being decided in his favour, all the 19 were admitted freemen in December, 1774. It was argued, therefore, that they should be put on the poll, agreeably to the received rule in similar cases (1).

[254] IIIId Head.] On the head of the special report, it was said, that this case required, that the Committee should, in that manner, testify to the House, their sense of the corruption which had taken place; as much at least as any of those cases which had already been the subject of special reports. The common-council had, it was alleged, been, in their corporate capacity, the instruments of bribery for the sitting members. The pretext of appointing such a number of constables, was but a gross artifice, devised with a view to evade the law, and they deserved to be particularly animadverted upon and punished by the House, for such a shameful abuse of their duty, and the trust which, by the constitution of the borough, had been bestowed on them.

(1) *Vide supra*, vol. i. Case of Sudbury. *Infra*, Case of Shrewsbury. Vol. ii. Case Derby.

The principal ground of complaint against the returning officer was, that, after having rejected voters for the petitioner, who claimed by birth, as the sons of honorary freemen, he had admitted others in the same predicament for the sitting members.

[255] When the counsel for the petitioner were going into the evidence, concerning the interference of the peer, complained of in the petition, the counsel on the other side objected to it. They argued, that, if the interference was such as would not have been improper in a commoner, (and the contrary was not pretended) the Committee could not take cognizance of it, being only a matter of privilege, which was not essential to the merits of the election. That such an enquiry might have been made by the ancient Committees of elections, which were also Committees of privileges; but that now there is a distinct Committee of privileges appointed annually, before whom such a complaint ought to be carried.

The Committee, however, thought, that they were bound to entertain the evidence, by the words of their oath, as they were sworn to try *the matter of the petition*.

[256] The evidence on the part of the sitting members was entirely defensive. The direct acts of bribery, and the promises charged upon Mr. Walsh and his agents, were positively contradicted by persons said to have been present when they took place; and, in some instances, by the persons who
were

were said to have given, or to have received, bribes; and those persons persisted in denying the acts of bribery, when confronted with the witnesses on the other side.

As to the constables, the purport of the evidence was, That there had not been above 100 appointed, till after several proposals for the regular conduct of the poll had been rejected by the petitioner. That it was first proposed, that the voters should poll by tallies, which Sir Watkin Lewes refused to agree to, because the two sitting members would have had two tallies for his one. That, on this objection, an offer was made, to suffer him to poll a tally for each tally polled by either of the sitting members, which he also refused. And that he likewise would not consent that a partition should be built, for the voters in his interest to come to poll on one side, and those in the interest of the sitting members on the other, which was meant as an expedient for preventing riots. That, at the election in 1773, which was contested between him and Mr. Rous, (Mr. Jackson, then mayor, being a friend to Sir Watkin) a great number of constables had been appointed of his party, who went armed with bludgeons, and occasioned great riots and confusion. That, at the present election, there was at least 200 or 300 persons, called body-guardsmen, who were chosen by clubs of Sir Watkin's friends in the different parishes, and who attended him during the election. That they were paid two shillings a day each, out of a fund raised

[257]

ed by the subscription of the members of the clubs*. That this circumstance had convinced the magistrates, that at least 100 constables would be necessary to keep the peace; and that, when Sir Watkin declined consenting to any plan for taking the poll in a regular manner, it became necessary to augment the number. That, as the intention was [258] to appoint none but inhabitants, and friends to the corporation, it was natural that most of the constables should be freemen, (the majority of the inhabitants being so) and that they should vote for the two candidates whose cause was espoused by the corporation. That there were no questions asked of the constables about their votes when they were sworn in. That their appointment could not be meant to influence them in favour of Walth and Rous, for that they had all promised their votes to those gentlemen before. That the few infirm persons made constables were appointed to afford them a protection under that character. The promises of money to the constables (except the 1s. 6d. a day) were positively contradicted, by the witnesses for the sitting members; only, the mayor said, he had given half a guinea to one person, as charity, out of his own pocket.

It was contended, that when voters come from a distance to serve a candidate, it is not bribery to pay them a reasonable compensation for their loss of time.

* It appeared that Sir Watkin did not contribute to this fund.

It was proved, that Mr. Walsh had repeatedly told his agents, that they must not, upon any account, give, or promise, money or other reward, to the voters; and those who attended him on his different canvasses swore, that he never went out on those occasions, without first emptying his pockets of all the money in them.

I have thus given a general, though far from a complete, account of the nature and tendency of the evidence produced on both sides in this case; not from a persuasion that it can be of much service on any future occasion, but merely to convey to the reader some idea of a cause which, on account of its great length, as well as many other circumstances, attracted in an extraordinary degree the attention and curiosity of the Public. It seemed to be understood *from the beginning*, that unless *all* the constables were set aside, a majority of votes must remain with Mr. Rous: *After the different inspections of the books, by which the enrolment of such a number of persons had been discovered who* [260] *were objected to as not enrolled*, it appeared to be thought necessary that all the constables should be struck off the poll, to leave the petitioner a majority over Mr. Walsh. The Committee, if this was really so, had only to act as a jury, in determining the cause. Indeed, the cases of Chippenham and Stockbridge* were mentioned, and it was argued (but seemingly not with much hopes) that, on the authority of those cases, it is not necessary for a petitioner, who has proved bribery on a sit-

* *Supra*, vol. ii. p. 404. 414.

ting member, to disqualify a majority of his votes in order to entitle himself to the seat. At least, the Committee made no particular determination on any of the different points, and nothing can be inferred with regard to them, from their ultimate decision.

[261] Several important questions of evidence were very fully discussed by the counsel, and determined by the Committee. To the chief of these I paid particular attention, and I shall give a faithful state of them; being daily more and more convinced, by my attendance on election causes, that it is highly necessary that certain fixed rules, with regard to evidence, should be adopted and adhered to by all Committees, and that the determinations of former Committees on this subject should be preserved in writing, because, if they are not, they will be cited and urged as authority to other Committees, from mere memory; which is always extremely fallacious, and grows daily more so as the intervening distance of time continues to increase. I shall distinguish the different points according to the days when they were argued and decided.

[1.] 30 Jan. Mr. Williams, the returning officer, being called by the counsel for the petitioner, to produce the poll, the counsel on the other side proposed to cross-examine him as to the appointment of the constables, and other points of the case.

This was objected to, as contrary to the practice of Committees, and as what would be extremely inconvenient to the petitioner's counsel, by anticipating

pating the defence, before they had examined witnesses to establish the charge.

On the part of the sitting members it was answered, That it is the established practice in other courts of justice, for one party to cross-examine witnesses called by the other party merely for the production of deeds, or writings; and that, as the petitioner's counsel might call their witnesses in the order they chose, the inconvenience, if any, was to be imputed to themselves.

The court being cleared, the Committee, after deliberation, determined,

That the counsel for the sitting members should not cross-examine the witness, to the appointment of the constables, *at that time*.

[2.] 31 Jan. One James Fincher was going to give an account of the conduct of a Mr. Swift, tending to affect Mr. Walth.

The petitioner's counsel objected to this, because [263] no evidence had been previously given to shew that Swift was an agent.

The point was argued, and the court being cleared, the Committee, after deliberation, resolved,

" That, when evidence is proposed to be produced of the criminal acts or conversation of any person alleged to be an agent of any of the parties, agency shall be previously *proved* (A)."

This resolution was accompanied with the following direction to the counsel :

“ The Committee expect that the counsel, immediately after *proving* the agency of any person, shall proceed to the *proof* of the criminality of such agent.”

[264] The idea of any agent, whether general, or for a special purpose, or single act; whether formally commissioned, indirectly authorized, *or avowed after the act done**, does not seem to be of difficult comprehension. Yet the several definitions of “ agent,” which were given in this cause, were very far from being satisfactory. They served strongly to confirm the old maxim; *Definitiones in jure sunt periculosa*.

[3.] 19 Feb. On the 7th of February, one Thomas Collins had been examined, and it appeared that he had gone to different voters in the interest of the sitting members, pretending to be their friend, in order to draw from them declarations that they had received money for their votes; but in giving his evidence, he prevaricated in the grossest manner. On the 10th of February, he was publicly reprimanded by the Chairman, On the 19th, the counsel for the petitioner having proposed to call him again, the counsel on the other side objected to it. They said, that, after having been censured by the Committee for prevarication, he certainly could not merit any credit from them. It appeared, likewise, that he had been in the room

[*“ For an agreement subsequent is equivalent to a command precedent.” Hawk. Abr. Co. Lit. 274.]

since,

since, during the examination of other witnesses, and it is a rule laid down at the beginning of every cause, that no witnesses shall * be admitted, who have been present when others were giving their evidence (1).

The Committee did not permit him to be called.

After this, a paper was pasted on the door of the Committee-room, by order of the Committee, to acquaint all persons with the above-mentioned rule. The effect of this rule is in a great measure lost when a cause lasts for a number of days, or weeks, for the witnesses have several ways of hearing what has been given in evidence, before they are called, without coming to hear it themselves. Among the great concourse of people, who, from curiosity or interest, are constantly in the room, there are many, who for the sake of conversation, and some, who, for worse purposes, relate what has passed. Copies of the minutes of each day being delivered to the agents on both sides, their contents transpire, and the news-papers are also filled with a sort of daily history of the proceedings. Towards the end of this cause several witnesses, who came to contradict what had been sworn in the beginning, declared, that what they knew of the evidence, they had learned by reading the news-papers in the country. [266]

[4.] 22 Feb. The mayor of the preceding year

(1) *Supra*, Case of Cardigan, p. 229.

is, by the general usage of Worcester, chosen one of the aldermen and justices, for the year after his mayoralty, and is called *high* alderman. He has no particular authority more than the others, and there is no direction in the charters of the city which make it necessary to make the mayor of the former year an alderman. The counsel for the petitioner proposed to produce evidence to prove, that, before the election, a Mr. Jackson, who was in the interest of the petitioner, had been chosen mayor for the foregoing year, because it was an expensive office; and that he had been passed by in the election year, and another person made high alderman, lest, in the capacity of a justice, he should have counteracted the partial appointment of constables.

[267] On the part of the sitting members, this evidence was opposed as *immaterial*, since it was not contended that the constitution of the borough required the appointment of Jackson to be an alderman.

The counsel for Sir Watkin Lewes said, that, as the general practice had been broken through in the case of Jackson, this was a very proper circumstance to be laid before the Committee, in support of the charge of criminal partiality against the corporation.

The evidence was admitted.

[5.] 27 Feb. Susannah Bevan, one of the witnesses for the petitioner, had sworn to an act of bribery by one Michael Brown, an agent for Mr.

Walsh.—The counsel for Mr. Walsh proposed to call Brown himself to contradict her evidence.

This was objected to.

It was argued, That, both from principle and former determinations, it was clear, that he was an incompetent witness for such a purpose. That in the cases of Milborne Port (1) and Shaftesbury (2), the testimony of agents had been refused, when offered to contradict the evidence given of their acts *. That, in the present case, the agents were complained of in the petition, and were therefore to be considered as parties to the cause. That to permit an agent of Mr. Walsh to disprove an act of bribery done by such agent, was in effect to receive Mr. Walsh himself to disprove it. That a witness ought not to be put in a situation where he must either accuse himself, if he has been guilty of bribery, and expose himself to the danger of a special report and a prosecution in the House of Commons, similar to those carrying on in the cases of Shaftesbury and Hindon, or else submit to the temptation of acquitting himself by the crime of perjury. That, in this point of view, such a witness must be considered as *interested*; and that, in the courts of law, the most remote degree of *interest* is sufficient to render evidence inad-

(1) *Supra*, vol. i. p. 134.

(2) Vol. ii. p. 308.

[* In the Case of *Great Grimby*, 6 March 1700 (Journ. vol. xiii. p. 379, col. 1.) an

agent against whom acts of bribery had been given in evidence was not permitted to be examined in defence.]

missible. That, if it should be once determined that agents may be* produced to deny acts charged upon them, whenever they are not produced the inference will be that they are conscious of guilt. That the case of the persons now under prosecution in the case of Shaftesbury would be peculiarly hard, if it should turn out that another Committee admitted a sort of evidence, of which if *they* could have availed themselves, perhaps the report against them, and the consequent proceedings, might have been prevented. That, if one candidate were to be guilty of bribery without the intervention of agents, and another should bribe only through the medium of agents, though each would be equally guilty, the first would not, and the other would, by converting his agents into witnesses, have it in his power to contradict the proof of his guilt.

[270] On the part of Mr. Walsh and Mr. Rous, (for though Brown was Mr. Walsh's witness, the Committee, after a debate at the bar on the subject, agreed to hear Mr. Rous's counsel on this question, to prevent a new argument if it should arise again in this part of the case) it was said,

That Brown's evidence was certainly admissible. That he was no party to the cause, the only parties being Sir Watkin Lewes and the two sitting members. That what he might say on his examination could not be produced against him on any other occasion†; and that, besides, he would on

† *Quare?*

no

no supposition be under any necessity of criminating himself, because he would not be obliged to give any answers that would have that effect. That, instead of opening a door to perjury, by admitting such evidence, the Committee would give witnesses an opportunity of perjuring themselves, without the danger of contradiction, by rejecting it. That, in a prosecution for bribery in Westminster Hall against Mr. Walth, Brown would be a competent witness. That, if a person charged as an agent should be holden not to be a competent witness, it would be an easy matter for a petitioner's witnesses to deprive a sitting member of the testimony of all his friends, and of those whom he might particularly choose to accompany him in all his conversations with voters, in order to be able to contradict any false accusation, by swearing that those persons had acted as his agents. That objections which only go to the credit of a witness, ought not to be attended to in a question of admissibility. That the distinction is well known, and clearly established in the courts of common law. That the Committee, after having, as a court of law, admitted Brown's evidence, would judge, in the capacity of a jury, of the degree of credit due to it. That, as to the case of Milborne Port, the objection had not been taken by the counsel, but was suggested by one of the members of the committee, and that the counsel on both sides were astonished when they found it had prevailed. That, however, the circumstances of Mr.

Medlycot,

[271]

[272] Medlycot, whose evidence was rejected in that case, were peculiar; for that he was not a mere common agent, but was, in truth, the person chiefly concerned in the cause, two of the candidates having stood entirely upon his interest in the borough. That in the case of St. Ives, (which was posterior to those of Milborne Port and Shaftesbury) on the authority of those cases, the counsel for the petitioners had objected to the evidence of one Robinson, an agent for the sitting members, who was charged by their witnesses with acts of bribery, but that the objection was over-ruled by the Committee, and the evidence admitted. That this part of the case is not mentioned in the printed report, but that they knew it to have been as now stated, one of themselves having been the person who took the objection (1).

The Committee, after long deliberation during that day, and part of the day following, resolved to admit the evidence (B).

[6.] 1 March. One Wintle having sworn that he saw Mr. Walsh give a bribe to one Elias Gregg or Gregory, the counsel for the petitioner objected to the calling Gregg himself to contradict Wintle's evidence.

[273] They said, That a voter is certainly interested to disprove what may tend to annihilate his own vote, and that therefore, according to the doctrine of Westminster Hall, Gregg's evidence was inad-

(1) Mr. Mansfield.

missible. That, on this ground, the evidence of a freeholder, in the case of Haslemere, had been rejected, when proposed to be called to prove the right of persons in the same situation with himself.

It was answered,

That this case was different from those of freeholders, freemen, or others, called to prove a general right of election in persons of their own description, because they have an interest to establish a *permanent* right, which they may exercise on future occasions. That a voter who comes to declare, whether he has, or has not, been bribed, hath not such an interest; for that, whatever the fact might turn out before the Committee, his future right to vote would not be affected. That the competency of a voter to give evidence concerning his being bribed cannot be denied, since the legislature has prescribed that they shall, at the poll, give evidence of it upon oath, if required. That, on the trial of the former case of Worcester, a man who was charged with having received 5s. 3d. from Mr. Rous for his vote, was admitted to contradict the charge.

[274]

In reply, it was contended,

That if a *permanent* right of voting is allowed to be a sort of interest sufficient to render a witness incompetent, the exercise of that right, but for *once*, is an interest of the same kind, and only differs in degree, and that the smallest degree of interest is, in the courts of law, an insurmountable objection

tion to the admissibility of a witness. That the bribery-oath, which may be administered at the poll, is only a sort of parliamentary test, and cannot be considered as a dispensation to a person, otherwise incompetent, so as to make him a witness on a trial before a Committee. That in the former case of Worcester the objection had not been taken.

[275] The court being cleared, the Committee deliberated among themselves, and then adjourned; and, next day, after deliberating again, the Chairman informed the counsel, that they had determined to *repel* the objection to Gregg's evidence.

[7.] 4 March. Mr. Mathers, the mayor, was proposed to be called as a witness, to disprove the charge, against himself, and the other justices, that they had abused their corporate powers, and had corruptly joined in making constables for the purpose of influencing the election.

His evidence was objected to, on the part of the petitioner; They said,

That, as there was a *specific* charge against the mayor, in the petition, and the petitioner had applied to the Committee for a special report concerning his conduct, and that of the other members of the corporation, he was clearly a party to the cause, and could not be a witness.

The answer to this was,

[276] That, if a man's testimony could be rendered inadmissible by a specific allegation against him in the petition, this would be a still more effectual way

way of depriving the sitting member of all his witnesses, than the other method which had been tried, of destroying the competency of a witness by swearing that he was an agent. It was also observed, that, almost in every petition, there is a charge against the returning officer; and yet, that in most election causes, tried during this and the preceding session, the returning officer had been examined as a witness.

The Committee, after deliberation, resolved,
To admit the evidence.

[8.] The counsel for the sitting members objected, in the beginning of the cause, to the admission of evidence to prove the declarations of voters, that they had been bribed (1). The Committee, however, admitted such evidence as against the voters themselves, so as to annul their votes; but [277] not as against the sitting members, so as to disqualify them.

There was considerable difficulty in this case, about the manner in which the counsel were to proceed. When Mr. Walsh's counsel opened his case, it was expected, on the part of the petitioner, that the counsel for Mr. Rous should proceed immediately to open his. But they did not; and when they came to examine *in chief* the witnesses called on the part of Mr. Walsh, this was objected to by the petitioner's counsel. They said, that if

(1) *Vide supra*, Case of Shaftesbury, vol. ii. p. 308, 309.

joint defendants are permitted, in courts of law, to examine one another's witnesses, when they make their defence separately, it is only after each has opened his defence. That what was now attempted would be attended with great inconvenience to the petitioner, as he could not be prepared to meet or obviate the effect of evidence, when the use to be made of it had not been explained.

[278] The Committee were of opinion with the counsel for the petitioner. They themselves, however, soon after, (finding that, on the cross examination of the witnesses for Mr. Walsh, many things would come out concerning Mr. Rous, which they would lose the benefit of, if Rous's counsel should not afterwards call the same witnesses), desired that the counsel for Mr. Rous might be permitted to cross-examine them.—This was accordingly agreed to by the Committee; who, at the same time, required, that Mr. Rous's case might be opened as soon as possible.—There was a separate summing up for him, and for Mr. Walsh, on different days; and then a general reply by the counsel for the petitioner.

[279] The evidence on both sides, with the arguments of counsel, exclusive of the reply, lasted from the 30th of January, to the 13th of March inclusive; making 38 days, besides Sundays. There were about 170 witnesses examined on the whole, many of them contradicting each other in the most positive manner; from which, and the duration of the cause,

cause, some idea may be formed of the difficulties the Committee had to encounter, in arranging the evidence, in weighing the contradictory parts of it together, so as to find which ought to preponderate, and in forming, at length, a general decision.

On the 5th of February, Sir Walden Hanmer being seized with a fit of the gout, the leave of the House was obtained for his absenting himself from farther attendance, if his health should require it (1). Accordingly, he did not attend after that day, and the Committee were reduced to the number of fourteen.

“ On the 13th of March the Chairman acquainted the House, that the evidence on both sides before the Committee was closed, and that some of the members being indisposed, the several parties had given their consent that an application should be made to the House, that the Committee might have leave to adjourn till the morrow night.”

[280]

And

An order of the House was made for that purpose (2).

On the 27th of March, the day before the Committee was to meet again, the Chairman informed the House that he had received a letter, desiring him to acquaint the House, that John Walter, Esq; one of the members, was ill in the country, and thereby prevented from attending the next day;

(1) Votes, p. 241.

(2) *Ibid.* p. 453.

and an order was made, giving them leave to proceed notwithstanding his absence (1).

By this means the Committee being reduced to thirteen, if any accident had happened to deprive them of another member for three sitting days, before they had decided the cause, the whole proceedings would have fallen to the ground; and a new Committee must have been chosen. On the 28th of March, the counsel for Mr. Walsh summed up his case (the evidence for Mr. Rous having been summed up before the adjournment).

On the 29th, the petitioner's counsel replied.

The Committee continued to meet every succeeding day (Sunday excepted) till the Friday following, the 5th of April, when they agreed on their determination.

On the 2d of April, the House adjourned to the 18th (2).

On Thursday the 18th of April, the Committee, by their Chairman, informed the House, that they had determined,

That the two sitting members were duly elected (3).

They made no special report.

(1) Votes, p. 532. (2) *Ibid.* p. 566. (3) *Ibid.* p. 576.

N O T E S

ON THE CASE OF

W O R C E S T E R.

PAGE 263. (A.) It is impossible to conceive that the Committee used the word "*proved*" on this occasion in its strict legal sense; because to show that agency was *proved*, (that is, that the Committee thought so) it would be necessary, in every particular instance, for them to come to a resolution, importing that the evidence offered for that purpose, did, in their opinion, amount to *proof* of it; and till such resolution had been delivered, it would not have been competent to the counsel to go into evidence of bribery by the supposed agent.—All that was meant was, that some probable ground of agency should be laid, before the attempt to prove bribery.

Note
(A.)

The reader will observe the contrariety in the determinations of the several Committees on this subject. (See the cases of Milborne Port, vol. i. p. 134. Hindon, vol. i. p. 175. Bristol, vol. i. p. 280. Shaftesbury, vol. ii. p. 310. and Ivelchester, *supra*, p. 159 to 162.) The point strikes me as a matter of mere regulation, on which a difference in the rule adopted by different Committees cannot be attended

Note
(A.)

with any bad consequence. If the evidence of bribery is begun with, and afterwards no evidence, or insufficient evidence, of agency is produced, we must suppose that the Committee will lay the evidence of bribery out of the case, and proceed, in forming their verdict, as if it had never been given. In criminal prosecutions at common law, when the evidence of an accomplice is competent, but without other corroborating evidence is not sufficient for conviction, a similar difficulty arises. If the accomplice is first produced, and after he has given his testimony no other evidence is brought to support it, what he has said becomes *immaterial*, and can be of no avail against the prisoner. Yet the practice of different Judges, like that of different Committees, has been different in this respect. Some have made it a rule, that the corroborating evidence should first be produced before the examination of the accomplice, but others have left this matter to the discretion of the counsel who conducted the prosecution.

Note
(B.)

P. 272. (B.) I have looked into the clerk's minutes in the Case of St. Ives, and find the entry of what relates to the question of Robinson's admissibility to be as follows :

(The witnesses for the petitioners had sworn, that the money which they had received from Mr. Praed the father was given them by the hands of Robinson; and that he was in the room during the whole of the conversation between them and Praed on the subject.)

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"The counsel for Mr. Praed propose to examine Mr. Robinson, to give an account of what conversation passed between Mr. Praed and the persons who had been examined, and to disprove what they have said.

"This evidence objected to by Mr. Mansfield, Robinson being a principal agent in the affair.

"Mr.

Notes on the Case of Worcester.

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" Mr. Buller follows Mr. Mansfield in the objection,

" Mr. Lee heard in answer.

" Mr. Elliot follows Mr. Lee.

" Mr. Mansfield heard in reply.

" Court cleared.

" Counsel called in, and acquainted by the Chairman,
" that the Committee are of opinion, that William Robin-
" son is a competent witness."

Note
(B.)

XXXI.

THE

C A S E

Of the BOROUGH of

D E R B Y,

In the County of DERBY.

The Committee was chosen on Wednesday, the 31st of January, and consisted of the following Gentlemen :

Paul Fielde, Esq. Chairman	- -	} Members for	Hertford.
Philip Raffleigh, Esq.	- - -		Fowey.
Charles Dundas, Esq.	- - -		Richmond.
Thomas Hay, Esq.	- - -		Lewes.
Benjamin Langlois, Esq.	- - -		St. Germans.
Staates Long Morris, Esq.	- -		Bamf. &c.
Thomas Dundas, Esq.	- -		Sterlingshire.
Sir Henry Hoghton, Bart.	- -		Preston.
Hon. Charles Marham	- -		Kent.
Sir Thomas Wynne, Bart.	- -		St. Ives.
Sir Thomas Miller, Bart.	- -		Lewes.
Andrew Stuart, Esq.	- - -		Lanerkshire.
Hon. Geo. Venables Vernon	-		Glamorganshire.
NOMINEES,			
<i>Of the Petitioners :</i>			
Abel Moysey, Esq.	- - -		Bath.
<i>Of the Sitting Member :</i>			
John Elwes, Esq.	- - - -		Berkshire.

PETITIONERS:

Daniel Parker Coke, Esquire:

Several Electors of Members to serve in Parliament for the Borough of Derby.

Sitting Member :

John Gisborne, Esquire.

COUNSEL,

For the Petitioners :

Mr. Bearcroft, Mr. Balguy.

COUNSEL,

For the Sitting Member :

Mr. Mansfield, Mr. Lee;

T H E
C A S E

Of the BOROUGH of

D E R B Y.

AT the General Election, Lord Frederick Cavendish, and Wenman Coke, Esq; were chosen members for this borough, but, within the time limited for that purpose by the annual order of the House (1), Mr. Coke, who was likewise returned for the county of Norfolk, made his election to serve for that county. A new writ being ordered to supply the vacancy for Derby, the election began on the 27th of January, 1775. Mr. Gisborne and Mr. Parker Coke were candidates. The former was returned; and Coke, (2) as well as certain

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(1) Votes, 5 Dec. 1774, p. 5.

(2) *Ibid.* 10 Feb. 1775, p. 206.

persons

persons in his interest (1), petitioned the House. The day appointed for taking their petitions into consideration was the 14th of July, and, before that time, the Parliament rose. But on the 31st of October, at the beginning of the second session of this Parliament, two petitions, *the same in substance with the former* (2), were presented to the House.

On Thursday, the 1st of February, 1776, the Committee being met, the two petitions were read.

Mr. Coke's petition set forth; That he was elected by a great majority of legal voters, but that Christopher Heath, the mayor and returning officer, had acted with great partiality, by rejecting the votes of many persons who had an undoubted right to poll, and who tendered their votes for the petitioner, and by admitting for Mr. Gisborne the votes of divers persons who had no right; and that, by these and many other unwarrantable practices of the mayor, as well previous to, as at, and in relation to, the election, the sitting member was returned (3).

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The other petition set forth; That the petitioners, and divers others, having a lawful and undoubted right, by birth or servitude, to the freedom of the said borough, and to be sworn burgesses thereof, previous to the said election claimed to be

(1) Votes, 16 Feb. 1775, P. 232. (3) Votes, 31 Oct. 1775, P. 33.

(2) *Supra*, Pref.

admitted burgesſes of the ſaid borough, but that the mayor, and divers aldermen of the ſaid borough, with a view to deprive the petitioners, and others, of their right of voting at the then next enſuing election, and in order to procure a return in favour of Giſborne, reſuſed to *admit* them to their freedom, although the ſaid mayor and aldermen, at the ſame time, admitted ſeveral perſons under the like circumſtances with the petitioners; that Coke was duly elected, by a majority of legal votes; but that the mayor had, nevertheleſs, made a return in favour of Giſborne.—Then followed other allegations, reſpecting the receiving and rejeſting votes, to the ſame effect with thoſe in the petition of Mr. Coke (1). [290]

There is no determination of the right of election in Derby, by the Houſe of Commons; but the counſel on both ſides agreed, That every member of the corporation has a right to vote.

Derby, which is a borough and corporation by preſcription, in the end of the reign of Charles II. ſurrendered all prior charters and grants, and all its liberties and privileges, into the hands of the Crown. Upon this a new charter was granted on the 5th of September, in the 34th year of Charles II. By this charter, the corporate name is, “The mayor and burgesſes of the borough of Derby, in the county of Derby;” and the corporation conſiſts of a mayor, 9 aldermen beſides the mayor, (or 10 in

(1) Votes, 31 October, 1775, p. 33. 34.

all) 14 brothers, (*confratres*) 14 capital burgesſes, a recorder, a common clerk, and an indefinite number of burgesſes. The mayor is choſen annually, on Michaelmas-day, from among the aldermen, by a majority of voices of the aldermen and brethren. The aldermen hold their office for life, unleſs removed for ill behaviour or non-reſidence. If, by death, or ſuch removal, a vacancy happens, one of the brethren is choſen to ſupply the place by the majority of the mayor and remaining aldermen. The brothers, and capital burgesſes, are, in like manner, choſen for life; but liable, as the aldermen, to be removed for ill behaviour or non-reſidence. A vacancy among the brothers is ſupplied from among the capital burgesſes, by the election of the majority of the mayor, aldermen, and remaining brothers; and a vacancy among the capital burgesſes from among the common burgesſes, inhabitants of the borough, by the election of the majority of the mayor, aldermen, brothers, and remaining capital burgesſes. The recorder is choſen by [292] the majority of the mayor, aldermen, common clerk, brethren, and capital burgesſes, and muſt be *vir probus, diſcretus, & in legibus Angliæ eruditus*. His office continues during the pleaſure of the mayor, aldermen, brothers, and capital burgesſes; and the voice of the mayor is neceſſary for his removal, as it is for the removal or diſfranchiſement of all other officers or members of the corporation. The common clerk, who is alſo *ex officio*, coroner, and clerk of the peace, is choſen by the major part of
of

of the mayor, recorder, aldermen, brothers, and capital burgesſes, the mayor or recorder being one, and continues in his office during the pleaſure of the majority of his electors. The aldermen, brethren, and capital burgesſes muſt be conſtantly dwelling, and reſident in the borough. The mayor, aldermen, brethren, capital burgesſes, recorder, and common clerk, all take an oath of office: the mayor (either on the day of election, or, if abſent, within one month after the election,) before his predeceſſor, or, in his abſence, before the recorder and common clerk, or one of them; the aldermen, brethren, and capital burgesſes, and the recorder, before the mayor, for the time being; and the common clerk, before the mayor and recorder, or either of them, and as many of the aldermen, brethren, and capital burgesſes as chooſe to be preſent. The recorder, and common clerk, cannot enter on their offices till approved of by the king. The mayor and recorder have power to appoint deputies; the mayor's deputy to be named from among the aldermen, and the recorder's deputy to be ſkilful in the laws of England. They too muſt take an oath of office before the mayor. The aldermen, brethren, and capital burgesſes, form the common council, and the majority of them, together with the mayor, have power to make bye-laws, impoſe fines, &c. The mayor, the biſhop of Litchfield and Coventry, his chancellor, the recorder and common clerk, the mayor of the year preceding, and the four ſenior aldermen, are the local juſtices of the peace, but removable at
the

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the king's pleasure. These are such material parts of the constitution as relate to the election, and numbers of the different officers of the borough, as they are specially established by the charter of Charles II. which was given in evidence to the committee. There is, besides, a *general confirmation of all former grants and privileges, franchises, immunities, &c.* in the following words :

“ *Et ulterius, de consimili gratia nostra speciali, ac*
 “ *ex certa scientia & mero motu nostris, pro nobis,*
 “ *heredibus et successoribus nostris, damus, concedimus*
 “ *& confirmamus prefatis majori et burghensibus burgi*
 “ *predicti, et successoribus suis, omnes & singulas lit-*
 “ *teras patentes, chartas & confirmationes perclarissi-*
 “ *morum progenitorum vel antecessorum nostrorum*
 “ *quorumcunque, eisdem majori & burghensibus burgi de*
 “ *Derby predicti, aut predecessoribus suis per quod-*
 “ *cumque nomen, sive per quaecumque nomina incorpora-*
 “ *tionis ante hæc tempora facta, concessa, seu confirmata,*
 “ *ac omnes et singulas donationes, concessiones, confirma-*
 “ *tiones, restitutiones, consuetudines, ordinationes, ex-*
 [295] “ *planationes, articulos, et omnes alias res quascunque,*
 “ *in quibuscunque litteris patentibus sive chartis quorum-*
 “ *cunque progenitorum aut antecessorum nostrorum, nuper*
 “ *regum & reginarum Angliæ, necnon omnia et singula*
 “ *in dictis litteris patentibus, concessionibus, chartis,*
 “ *confirmationibus, seu eorum aliquo, contentis, recitatis,*
 “ *specificatis, confirmatis seu explanatis, ac omnes et*
 “ *singulas jurisdictiones, authoritates, exemptiones, pri-*
 “ *vilegia, libertates, franchisas, quietantias, immuni-*
 “ *tates, liberas consuetudines quascunque, cum altera-*
 “ *tionibus,*

" tionibus, additionibus, explanationibus et declarationibus supra mentionatis."

By this clause, all such parts of the former constitution as were not altered by new provisions, were continued and confirmed.

Thus far the counsel on both sides agreed. But it will appear, in the sequel of the case, that they differed with regard to one very material part of the constitution, *viz.* the legal mode of admitting persons to be freemen, or burgeses (for these terms were agreed to be synonymous in Derby). [296]

The numbers on the poll, as produced to the Committee by the mayor, who is the returning officer, were as follows :

For Mr. Gisborne	-	-	-	-	-	343
For Mr. Coke	-	-	-	-	-	329
						<hr/>
Majority for Mr. Gisborne	-	-	-	-	-	14
						<hr/>

But the counsel for the petitioners, in opening their case, said, that they proposed to add 42 to the poll for Mr. Coke, *viz.*

26, who, being entitled to be admitted to the freedom of the borough, had demanded such admission before the election, and having been refused, had tendered their votes, at the poll, in favour of Mr. Coke.

12, under the same circumstances, but who had demanded to be admitted on different occasions.

4, who

4, who had their freedom, but whose votes were rejected by the mayor.

They also proposed to strike off 16 from the poll for the sitting member, *viz.*

[297] 5, who live in an alms-house called Derby Hospital.

3, for having received parish relief.

3 honorary burgesſes, admitted within the year.

3, who had been admitted burgesſes, on the title of ſervitude, without having ſerved a ſeven years apprenticeship.

2, who were never admitted to their freedom.

In the courſe of the cauſe, however, it was only neceſſary for the Committee to hear evidence, and to decide, concerning the votes of 27 (1) of thoſe who, claiming by antecedent titles, had demanded admiſſion to their freedom, and having been reſuſed, tendered their votes for Mr. Coke.

[298] It was admitted, on both ſides, that the corporation is in *poſſeſſion* of the power of beſtowing the freedom of the borough, either by purchaſe or favour, on perſons who have no antecedent titles. Freemen, ſo admitted, are called honorary. The votes of the honorary freemen were objected to at the poll, on the part of Mr. Coke, and, in the interval between the election and the trial of the

(1) In the arguments of the counſel on both ſides, as well as in the minutes of the evidence, I find this number ſometimes reckoned 27, and ſome-

times only 26. The reader will perceive that this inaccuracy is not of the ſmalleſt conſequence.

cauſe,

cause, application was made to the court of King's Bench, for *informations, in the nature of quo warrantos*, against the honorary freemen, but the court having thought, that sufficient matter was not laid before them in the affidavits, to justify them in granting informations, they were refused (A). The counsel for the petitioners did not, therefore, question the votes of the honorary freemen before the Committee. Of this class, votes had been received on the poll, as well for Mr. Coke as for Mr. Giffborne, under Coke's general protest against them.

It was also admitted on both sides, That the previous rights, which give a title to demand the burgesship of Derby are,

1. To be the son of a burges, born after the admission of the father to his freedom, and to be resident in the borough at the time of the demand. [299]

2. To have served an apprenticeship of seven years to a freeman, and to be resident, in like manner, at the time of the demand.

A question arose, about the residence of the master, necessary to the acquisition of this species of title, which shall be taken notice of afterwards.

The counsel for the petitioners alleged, that the 27, whose votes they meant to establish, were possessed of inchoate rights, either by birth or servitude and that, before the election, they had demanded to be admitted in the regular manner, by the persons who, according to the constitution of the borough, are appointed to admit burgeses. That,

having been refused by those persons, they ought to be considered by the Committee, as if they had been admitted, and that their votes should be added to the poll.

[300] On the other side the principle was admitted, but, supposing those persons possessed of antecedent rights, the fact of their having demanded their admission of the proper persons, or in the proper manner, was denied.

The counsel for the petitioners said, that by the express provision of the charter, the persons appointed to admit freemen are, the mayor and three aldermen, and that the persons who had been refused, had demanded of the mayor and three aldermen to admit them.—On the part of Mr. Gisborne it was denied, that this was the legal mode of admission, or that there was any provision to establish such mode in the charter.

The original charter being produced, this point was separately argued and determined.

That part of the charter by which, according to the counsel for the petitioners, the manner of admission for which they contended is established, is as follows :

[301] “ (1) *Et ulterius volumus, ac, per presentes, pro nobis, heredibus & successoribus nostris, ordinamus, et firmiter injungendo præcipimus, quod major, aldermanni, confratres, communes consiliarii, recorder, & com-*

(1) This, and the foregoing clause, were transcribed from an examined copy. The original is preserved in the chapel of the Rolls.

“ *munis*

" munis clericus, et omnes alii officarii & ministri nostri
 " burgi prædicti, virtute et secundum tenorem harum
 " literarum nostrarum patentium facti sive constituti,
 " seu in posterum nominandi, eligendi seu constituendi,
 " antequam ipsi, seu eorum aliquis vel aliqui, ad execu-
 " tionem sive exercitationem officii, sive officiorum, loci,
 " vel locorum, cui vel quibus sic respectively nominati,
 " appunctuati, sive constituti sint vel fuerint, admit-
 " tantur, aut aliquo modo in ea parte intromittant, sive
 " eorum aliquis respectively intromittat (1), tam sacra
 " corporalia, vocata THE OATHES OF ALLEGIANCE
 " AND SUPREMACY, ac omnia alia sacra per statuta
 " hujus regni nostri Angliæ pro talibus officiariis &
 " personis appunctuata, super sacrosanctis Dei evangeliiis [302]
 " præstabunt, quam omnes declarationes et subscrip-
 " tiones, in aliquibus statutis pro hujusmodi officiariis
 " & personis prædictis similiter appunctuatas, facient
 " & subscribent, & quilibet eorum præstabit, faciet, et
 " subscribet, coram tali personâ vel talibus personis, (2)
 " QUABUS ET QUÆ ad hujusmodi sacra, declarationes,
 " et subscriptiones dandas & præstandas per præsentem
 " vel per statuta hujus regni nostri Angliæ, ad præsen-
 " tem vel in posterum, appunctuata & designata sint (3),
 " FUIT, vel fuerint. Provisio etiam, et volumus, quod
 " qualibet persona de cetero IN LIBERTAT. burgi
 " prædicti admittenda, ante [quam (4)] admissionem
 " suam (5), separalia sacramenta superius ultimo men-

(1) In the copy, *intromittant.*

(4) So in the copy.

(2) *Quer.* In the copy, *quab*
& que.

(5) " *iam.*" it would seem,
 is omitted here.

(3) *Quer.* So in the copy.

" *tionata, quam declarationes et subscriptiones prædictas,*
 " *præstabit, faciet, & subscribet, coram majore & alder-*
 " *mannis burgi prædicti pro tempore * existentibus,*
 " *VEL QUATUOR EORUM; quibus quidem majori &*
 " *aldermannis, vel quatuor eorum, plenam potestatem*
 " *& auctoritatem ad sacra prædicta danda et admi-*
 " *nistranda damus et concedimus."*

When the original charter was produced by one of the agents, the counsel for the sitting member desired that he might be sworn, and asked from whence he had brought it; but on the part of the petitioners it was said, and agreed on all hands, that, indeed, with regard to a *common deed* when it is more than thirty years old, the law not requiring that the subscribing witnesses should be produced to prove the execution, the person producing the deed must be sworn, and must prove that it was taken out of the proper repository; but that *charters*, and all instruments under the great seal, prove themselves, and that, with regard to them, no collateral evidence is required to prove their authority.

[304] The counsel for the petitioners contended,

That the mode of admission is clearly and explicitly chalked out by the words just stated from the charter, *viz.* That admissions are to be by the mayor and three aldermen, and that this being so, any contrary usage or bye-laws which the counsel on the other side might prove, would be illegal, and therefore ought not to be attended to by the

Committee.

Committee. That it was a known and undeniable rule of law, that no usage, however constant and reasonable, nor any bye-law, can be of force to alter the positive directions of a charter. That among numberless other cases, that of Helleston was in point to prove this doctrine, the court of King's Bench having, in that case, determined, that an usage contrary to the charter, although it had been established for above two centuries, was void (1).

On the other side, this rule was not denied ; but it was insisted upon, that it did not apply to the present case ; for that, in truth, nothing was said [305] about the mode of admitting burgesses in the clause of the charter relied upon by the petitioners. That all that the *proviso* in that clause prescribes is, that every person, *before* (" *antequam*" being clearly written by mistake instead of "*ante*") his admission to the freedom of the borough, should take the oaths of allegiance and supremacy, and other parliamentary oaths, before the mayor and three aldermen. That, from the obvious sense of the words, it is plain that the administration of those parliamentary oaths is a step to be taken *previous* to the admission, and that the admission is something distinct from this. That the intention and meaning of the charter is, that, by taking those oaths, persons who are to be admitted should first prove themselves to be loyal subjects, and proper

(1) *Vide supra*, vol. ii, Case of Helleston, p. 5.

and safe persons to be received to the freedom of the borough. That, by the foregoing part of the clause, the same parliamentary oaths are required [306] to be taken by the principal officers of the corporation; but that, whereas *they* are to take them before the county magistrates, who by the statutes are commanded to administer such oaths, the mayor and three aldermen are empowered to administer them to persons who claim the freedom of the borough. That the reason of this provision evidently is, to relieve tradesmen and mechanics, who are the sort of persons most likely to make such claim, from the inconvenience and expence of leaving their home, to take the oaths in question before the persons appointed by the statutes to administer them. That those oaths are very different from the corporate oath of office which burgesses must take on their admission to the freedom of a borough. That the charter of Charles II. not having said any thing about the mode of admission, that mode must be discovered by the general law of corporations, or by some prior charter, or constant usage, which is proof of a prior charter which once existed. That, by the law of corporations, every act which concerns or affects the interests of [307] the whole body, must be done in a general corporate assembly of the whole, unless where, by the express provisions of a charter, or by prescriptive usage, a partial number are empowered to do such acts. That the admission of a person to the freedom of the corporation is an act of this kind; and that,

that, as the charter of Charles II. had been shewn to have made no provision on this subject, if there were no established usage to confine the power to a certain number, no admission to the freedom of Derby could be valid, unless at a general corporate meeting. That, however, there was no occasion to recur to the general law of corporations; for that it could be proved that, as far back as evidence goes, and down to the year 1772, the constant usage of this borough had been to admit freemen at what is called a *common hall*; which is a meeting consisting of not less than 20 members of the common-council, of which 20 the mayor must be one. That, till 1772, no admissions were ever known to have been made by a mayor and three aldermen only, or at any meeting but a common hall. [308]

The counsel for the petitioners insisted,

That, if the Committee should think the words of the charter sufficiently explicit as to the mode of admission, the counsel on the other side could not be permitted to give any evidence, either of usage or bye-laws, to contradict it. But that, if the court should be of a contrary opinion, and if the sitting member's counsel should be allowed to prove, and should prove, the regular mode of admission to be otherwise than by the mayor and three aldermen; yet they would still contend that, under all the circumstances of the case, the application and demand of the rejected voters had been such as ought to induce the Committee to put them upon the poll,

The court being cleared, the Committee deliberated for some time, and then the counsel being called in, they were informed by the Chairman, that the Committee had come to the following resolution, *viz.*

[309] Resolved, " That the clauses in the charter, " which have been produced to the Committee, " have not so established the mode of admission " of the freemen of this borough as to exclude " other evidence."

After the Committee had come to this resolution, what the counsel for the sitting members had alleged was clearly proved, or admitted, *viz.*

That, until the year 1772, as far back as evidence goes, the usage had been to admit freemen, whether *honorary* or by *title*, at a common hall only; and that an oath of office was then administered to the persons admitted, different from the parliamentary oaths prescribed by the charter. In confirmation of the evidence on this subject, a bye-law of the corporation was produced, made in the year 1743, which is as follows :

10 Dec. 1743. " For the better regulation of " the swearing and admitting of those who shall " for the future claim their freedoms or burges- " ships within this borough, and to prevent any [310] " impositions that may be occasioned thereby; it " is now ORDERED, that every person or persons, " who shall or may claim any such right or free- " dom as aforesaid, do and shall, before they or " any of them are or is admitted into the same, " at

“ at some *common hall*, to be held in and for the
 “ said borough, exhibit in writing their respective
 “ name and names, and how and in what manner
 “ they, or any of them, do severally claim and
 “ derive their respective rights to such freedoms
 “ or burgeships, that the same, by a proper Com-
 “ mittee of this corporation, may be enquired into
 “ or examined ; and if found right and consistent
 “ with the laws, orders, and rules of this corpora-
 “ tion, such person and persons shall and may be
 “ sworn and admitted a burges and burgeses
 “ of this corporation, at the then next, or at
 “ some other succeeding *common hall*.”

It appeared that, from the making of this bye-law, till 1772, the practice had been, for all persons claiming to be admitted, to give in their claims at one common hall, and, if there was any doubt concerning their titles, they were not admitted till the next ; but where their titles were unquestionable, they still continued frequently to be admitted at the same common hall where they had made their claims.

[311]

In 1772, there was a contested election for Derby, on a vacancy occasioned by the death of Mr. Fitzherbert. Thomas Eaton was mayor for that year, his mayoralty having commenced at Michaelmas, 1771 ; and he, from a misapprehension of the statute of 12 Geo. III. cap. 21, (giving costs to persons who, being entitled to their freedom in any borough, and having applied to the mayor, or other person, officer or officers, who hath or have

have authority to admit to such freedom, and being refused, after proper notice, shall sue out a *mandamus*, and in consequence thereof be admitted) thought himself entitled and bound to admit such persons, as had antecedent rights, and should apply, [312] without the concurrence or presence of any other member of the corporation.—Accordingly, he admitted several at his own house; but this was soon discovered to be an illegal proceeding, and the persons whom he had so admitted had the fees which they had paid returned to them, and did not, unless admitted again, attempt to exercise the right of voting, or any other franchise.

About this time, however, (*viz.* 1772) the charter having being examined by some lawyer, he construed the part of it which has been stated to mean what the counsel for the petitioners had contended for on the present occasion. In consequence of his opinion, it was thenceforward, till about the time of the last election, universally understood by all parties in the borough, that the regular mode of admission, as expressly prescribed by the charter, was by the mayor and three aldermen. All admissions, therefore, of freemen having antecedent titles were, from thenceforth, made by the mayor and [313] three aldermen. Some indeed were admitted at common halls, but then, as appeared from the books, there were always present the mayor and three aldermen, which is not necessary to constitute a common hall; any twenty members of the common council, the mayor being one, are sufficient
for

for that purpose. Honorary freemen still continued to be elected and admitted only at common halls. There are no stated times for holding common halls, but they are called by the mayor at his discretion. He sends to the common clerk, who gives three days notice by his summons; the day of the delivery of such summons being one.

The above circumstances having been laid before the Committee, the counsel for the petitioners allowed that the legal mode of admitting freemen was not as they had at first imagined, and that it did not depend upon the clauses in the charter on which they had relied, but that a common hall was, by the constitution of the borough, proved by usage, the only legal meeting for that purpose. [314] They likewise admitted, that the persons, who had applied and had been refused, had not applied to a common hall, nor required that a common hall should be called, and that they could not be supposed to have had admissions by a common hall in their contemplation. But they contended, that those persons,—having applied to the mayor and three aldermen, according to what was *universally* understood at *that time* to be the constitution of the borough,—having applied to those who were, at least, the proper persons to administer the preliminary oaths, without which they could not complete their admissions,—having been promised their admissions,—put off from time to time,—and at last refused by the mayor, with a view to deprive them of their votes, (he knowing them to be in
the

the interest of Mr. Coke,)—were entitled to be put upon the poll. Of this, they said they would satisfy the Committee after the evidence on the subject should be heard.

- [315] The counsel for the sitting member objected to the admission of any evidence to prove such facts as the counsel on the other side had stated. They said, that admitting (for argument's sake) the facts to be true, still they would be perfectly immaterial. That, as the common hall was now allowed to be the only legal meeting for the admission of burgesses, it would be mere loss of time to go into evidence to shew applications to another sort of meeting for what that meeting had no right to do, and what, if it had done it, would have been void, and would have conferred on the claimants no right of voting, nor any other franchise. The utmost, they said, which had ever been, or ever could be done, in cases of this sort, was, to allow the votes of persons who, having clear titles to admission, had applied agreeably to the established law of the corporation, and had been refused. That if a man proceeds in a manner contrary to what is prescribed, either by the
- [316] general law of the land, or by any particular local law under which he acts, he must suffer for his ignorance, and cannot claim to be put in the same situation as if he had known the law, and had acted agreeably to it. That there are not two more established maxims than, that ignorance of the law shall be no excuse for departing from it, and

and that every man shall be considered as acquainted with the law, and therefore, that those who do not follow its directions shall not gain any advantage, to which, if they had followed them, they might have been entitled.

In answer to these and many other arguments, it was contended, that, although there are many cases where persons applying, within the precise and exact mode prescribed by law, to be admitted to their franchise, and being refused, have been considered as if actually in possession of it, yet it does not follow from those cases, that all persons who have *not* precisely followed the strict legal line, shall, in every instance, be considered as *not* entitled to their franchise. That, on the contrary, the principle of those cases extends much farther, being clearly this: That, where persons entitled to any right do *all in their power* to obtain possession of it, and are prevented by the unfair partiality of another, they shall be permitted to exercise such right, and shall not suffer by the injustice which was intended to have been done to them. That the Committee was a court of equity as well as of law; and that when they considered what was the universal opinion in this borough concerning the legal mode of admission, at the time when the persons in question made their application, they would remember two maxims, equally rational with those alluded to on the other side, and so well established as to have become in a manner proverbial, viz. "*Summum jus, summa injuria*," and "*Com-*

[317]

"munis"

[318] “*munis error facit jus.*” That the last ought, at least, to weigh so far in the present case, as to excuse the claimants for having chosen a mode of application, which, although not agreeable to the constitution, was according to the sense, of the whole corporation.

In short, the whole case, as afterwards *proved*, being now stated *hypothetically*, the arguments on this previous question, concerning the admissibility of the evidence, in a great measure anticipated those which arose upon the facts after they were established.

The court being cleared, after deliberation, the counsel were called in, and informed by the Chairman of the following resolution :

Resolved, “ That the Committee are of opinion, that the counsel for the petitioners shall proceed on their evidence.”

Upon this they went into the evidence on the whole of their case, which consisted of two different parts, and had two distinct objects, *viz.*

[319] I. To show the nature and circumstances of the application which the persons, whose votes they meant to establish, had made to be admitted to their freedom; and the different delays, and final refusal, of the mayor to admit them before the election.

II. To substantiate the titles of those persons, by proving either their birth or services as apprentices to

have been such as, by the custom of the borough, gave them a right to demand their freedom.

I. The principal witnesses on the first head, were Edward Wilmot, Esq. barrister at law; Mr. John Harrison, surgeon, in Derby; Mr. John Harrison, attorney; Thomas Eaton, alderman of Derby; William Merrill Locket, town (or common) clerk; John Cook; and Christopher Heath, Esq. the mayor of Derby (B).

Mr. Wilmot said, that, on the morning of the 5th of January, 1775, (about three weeks before the election) he went, with Mr. Coke the petitioner, and two or three other gentlemen, to the mayor's house. That Mr. Coke told the mayor, [320] that he had come to give him the trouble of admitting him to his freedom. That the mayor, after some conversation, said, "If you wish to be admitted now, (or "sworn," for he could not say which of these words was used) "we will do what we can to accommodate you, or get more members." That of the magistrates, besides the mayor, only John Heath, an alderman, and brother to the mayor, was then present. That, *they* sent for Mr. Flint, and Mr. Bingham, two aldermen, who came; and that the mayor then said, "Now, Sir, we will swear you in." That they gave Mr. Coke the book; but that, before they began to swear him, Flint said "If we admit (or "swear) you, I apprehend there are a great many will insist on the same." That Mr. Coke replied,

plied, " 'Tis true, there are;" on which the mayor or his brother said, " If that is the case, you must excuse our admitting (or swearing) you now." That Mr. Coke said, " Mr. mayor, you must use your discretion; but I must desire you will call [321] " a meeting, or hall." That he did not recollect which of those two words Mr. Coke used. That the mayor answered, that he had no objection; and that he would endeavour to get a sufficient number by the afternoon. That, in the course of the day, they received a message from the mayor, informing them, that he had got a sufficient number of aldermen to attend; and appointing them to come to one of the rooms of the town-hall, at a certain hour in the afternoon. That, at the hour fixed, he, and Harrison, the surgeon, went to the hall, but without Mr. Coke, and that they found the mayor, Flint, Bingham, and Mr. Wylde, an alderman; and that Mr. Edwards, another alderman, and Mr. Grainger (who was steward of the corporation) came in. That the witnesses, and Harrison, went by the desire of Mr. Coke; and that they told the mayor, that they came to see that proper tender was made by those who claimed their freedom. That Grainger, with much warmth, objected to their being present, not being members of the corporation; but that, on an appeal to the [322] town clerk, he decided, that they might stay. That several claimants came in, and tendered the evidence of their titles, viz. those who claimed by apprenticeship, their indentures, and those who claimed

claimed as sons of freemen, certificates of their birth. He then specified, by name, 25 of the 27, who all produced either indentures or certificates. He said that he having satisfied those persons that their documents would be safe in the hands of the mayor, they were all put up in a bundle, and delivered to the mayor, who said that in the mean time he would look into their claims, between that day and Monday next. That he could not undertake to assert, that the mayor said he would *admit* them on Monday. That, on Monday the 9th, the mayor, and Mr. Crompton, alderman, and Flint and Bingham, attended. That several new persons then tendered their evidence. That some of those who had appeared on the 5th, attended again on the 9th, but he could not say, whether they tendered the proofs of their titles on that occasion (1). That, at that time, the mayor and aldermen admitted 3 or 4 persons who had claimed a considerable time before, but none who had claimed on the 5th. He specified a person who claimed, for the first time, on the 9th, and who produced his certificate. He said that, when application was made to admit certain claimants who tendered evidence of their right, the mayor and Crompton declared, it was too late in the morning, and said, " We have other business to do, and therefore we " will give you our honours, that we will meet " again on the next Monday, and swear in (or admit) all those who shall make out their rights." That the mayor desired they might meet an hour

[323]

(1) *Quere?*

sooner than the usual time, which is 11 o'clock, because there would be a great many to be admitted; and that 10 o'clock was fixed upon. That, on the 16th, he (the witness) went, at the hour appointed; and that other claimants, besides those who had applied before, attended; but that the mayor did not come, nor any of the aldermen. That he saw the mayor about 11 that morning, at the market-place, and asked him, if he would not come to the hall? to which he answered, No, he should not, for he found he had been deceived (or misled) about some of the claims, the time before: and that he was come to a resolution not to admit (or swear in) any more before the election.

[324]

Being cross-examined, he said, He did not know or hear of any of the claimants offering *witnesses* to prove the execution of their indentures, or that they had served their time; or, that those claiming by birth produced any other evidence than a certificate, *i. e.* a copy of the register. That, if witnesses had attended, he thought he must have noted it.

He said, on his re-examination, that, when the indentures and certificates were produced, the mayor did not express any doubts or difficulties, or ask for any other evidence, or say that any thing more was necessary.

John Harrison, surgeon, proved nearly the same facts with Mr. Wilmot. He said, that in the altercation with Grainger, he (Grainger) said, it was not customary to have any one present at their meetings but themselves, and that the only proper

per evidence was the corporation-books. That Mr. Wilmot asked him how a *mandamus* could be supported, without witnesses to prove the tender; and that, on the reference to the town-clerk, *he* said, it was undoubtedly necessary to have witnesses. That, upon this, the mayor agreed to take the tender of the different claimants. These he specified by name as Wilmot had done. He said, That the mayor desired the indentures and certificates might be left with him, and that he (the witness) and Wilmot, engaged, to some who expressed doubts about entrusting them with him, that they would be safely returned. That the mayor said, he desired to have them, to enquire into the claims, and wanted to appoint a future day for their admission; that they should have a meeting again on the Monday following, and desired they would then attend. That, on the 9th, he, together with Wilmot and John Harrison the attorney, attended. That, at that time, several people claimed. That (1) six were sworn, who had [326] tendered about a month before. That two of those who had claimed on the 5th were in the room, and again desired to be admitted, and that all the others whom he had named, as claiming on the 5th, were then attending at the outside of the door. That they were desirous of coming into the room, but that he desired they would not. That the mayor said, he had some particular business to transact that morning, which made it inconvenient to admit them then, and desired they might

(1) Mr. Wilmot said, "three or four." *supra*, p. 323.

attend on the Monday following; and that Wilmot, Harrifon the attorney, and he (the witness) would attend with them. That ten o'clock was the hour fixed. That the two claimants who were in the room, and who had before attended on the 5th, said, it was hard there should be so much trouble in coming again; and that the mayor and Crompton told them, "Gentlemen, you may depend upon it, you shall all be admitted, who have a right, on Monday next; we give you our honours, you shall be admitted." That [327] they still pressing to be admitted at that time, the mayor and Crompton laid their hands upon their breasts, and said, "Do you doubt our honours? We give you our honours, you shall be admitted." That, upon this, Wilmot and Harrifon the attorney left the room, and that, as the witness was at the door going out, the mayor called to him, and said, "We shall now have proper time to examine into the claims, and those who we find have a right shall be *properly* admitted, on Monday." He said, that he (the witness) did not attend at the hall on the 16th. That he was going there, but that he saw the mayor canvassing with Mr. Gisborne. That he saw him in different parts of the town with Mr. Gisborne, both on that, and on the following day.

Being cross examined, as to the nature of the evidence of titles offered by the claimants, he said, That the certificates of birth were signed by the persons who kept the register. That there was no other

other evidence of *birth*; but that they looked in the corporation-books, for the admissions * of the fathers. That there was no evidence of apprenticeships but the indentures; no evidence being produced of the execution, or of the actual service.

On his re-examination, he said, that there was not, on the part of any one, any objection made, or any doubt suggested about the sufficiency of this evidence; and that the six who were admitted on the 9th, produced no other sort of evidence. That the oaths of allegiance and supremacy were administered to them, and, he believed, some other oaths. That some of them polled at the election, and no objection was made to their votes.

Both Wilmot and he agreed, that the claimants who were refused, had no idea of being admitted by any other persons than the mayor, and three aldermen.

It was proved, that 21 of the persons, who claimed on the 5th, 9th, and 16th, were admitted after the election, on the 1st of February, at a common hall; and the last witness said, that the 21 made no application for the common hall, but that it was advertised by the mayor, about the day [329] of the election.

John Harrison, attorney, proved exactly the same facts with the former witness, as to what passed on the 9th; and specified, as he had done, the names of those who then attended to be admitted. He said, That he went out and told them what the mayor and Crompton had promised, and

desired them to attend accordingly. That, on the 16th, he went round to those persons, and desired them to come, and that he believed they were all at the hall by 10 o'clock. That he himself went at that time, and that, after waiting half an hour, he was told that the mayor was canvassing with Mr. Gisborne. That he went to him, and found him canvassing with him, and one or two of the Lords Cavendish (who were admitted to have been active friends of Gisborne). That he beckoned to him to cross the street to him, which he did. That he [330] told him, the hour he had appointed for swearing in the burgessees was come, and asked him, how soon he intended to go to the hall? That the mayor told him, he should go at 11 o'clock, about other business; but should not swear in any burgessees that day. That he asked him if he remembered the promise he had made on the preceding Monday; and he said he did; but he had been deceived in swearing in some of the six, on the 9th, who had no right. That he (the witness) answered, that he knew nothing of *their* rights, but that this was no excuse for his not going to the hall, and swearing in the others; that he had said he would examine into their rights, in the course of the week, and if he had done so, he could not be deceived as to *them*. That the mayor replied, that it did not signify, for that he *could* not (or *would* not, he did not recollect which) swear in any burgessees before the election. That, upon this, he informed the claimants, that they need not stay longer,

longer, the mayor having declared that he would not swear them in.

* On his cross-examination, he said, That when the mayor promised they should be admitted, he had no doubt but that it was meant that they should be admitted by the mayor and three aldermen.

It appeared from his testimony, and that of the former witnesses, that many others, besides those whose votes were now attempted to be substantiated, applied to be admitted. He said, that he thought about 60, altogether, claimed on the 9th.

Thomas Eaton, alderman, (and the person already mentioned to have been mayor from Michaelmas, 1771, to Michaelmas, 1772) said, He was about 60 years of age. That he had been conversant about the business of the corporation for nine-and-twenty years, except the last three years, and that he had generally attended the admission of burgeses. That the evidence which persons claiming by birth usually produced, was a certificate, *i. e.* a copy of the register, signed by the person who kept the register; or, if they were dissenters, that they commonly brought a book; in which their births were entered by their own parents; and that this was the only evidence required. That persons claiming by service, always brought their indentures, and sometimes the masters came with them. That it was not the practice to produce the subscribing witnesses. That he had

[332]

R 4 known

known persons rejected, because the duty on the indentures had not been paid. That, when there was any thing doubtful, the indenture was left to be enquired into with Mr. Grainger, or some other member of the corporation.

[333] William Merril Locket, attorney, (the town-clerk) said, as to the evidence usually produced by persons claiming to be admitted, That the certificate, and both parts of an indenture, had been generally understood to be sufficient. That, if any doubt arose, time was taken to enquire; which was done in the town, within a few days, or a week. That, when persons claimed by birth, the books used to be examined, to see whether, and when, the father had been admitted. That, if any *doubt* arose on a claim by service, they sometimes called for a subscribing witness; and that, in all cases where there were doubts, the admissions were put off till they were cleared up. He said, that he was present at the meeting on the 5th, but not on the 9th.

On producing one of the corporation-books, it appeared by the lists, that 92 persons in all had claimed to be admitted on those two last mentioned days; and, by another book it appeared, that, of those 92, 65 had again applied, at two common-halls holden since the election, *viz.* one on the 1st, and another on the 15th, of February; and that, of the 65 thus applying a second time, 27 had been admitted at those two common-halls, and 33 rejected.

Cook,

Cook, (and one Smith) were called to shew, that Heath, the mayor, was to be considered as an agent for Mr. Gisborne.

*Cook said, That, at a public house in Derby, about a week before the election, the mayor, in the presence of the landlord and landlady, asked him for his vote in favour of Gisborne. That he replied, he must study his own interest, and that they, (the corporation) had never considered his father, nor any of his family, in the distribution of the charity money (which is lent out to trades-people in Derby without interest). That the mayor said, he would not promise any of the money, but that after the election should be over, there would be some of that money to be disposed of, and they should certainly think of those who served them, and not of those who went against them; and desired him to study his own interest.

It was proved by Smith, and admitted on the part of Mr. Gisborne, that the mayor had signed a paper requesting him (Gisborne) to become a candidate.

Mr. Heath, the mayor, agreed with the other witnesses in the material circumstances of what passed on the 5th, 9th, and 16th. He said, That the admissions were adjourned on account of the great number of claimants, and because they were not prepared with people to assist them. That, at the solicitation of Coke's friends, they admitted six on the 9th. That he did not think they examined the claims of any others. That the evidence
pro-

produced by the fix, consisted of indentures and certificates. That upon these there were doubts, but that Harrison, the surgeon, saying, " You may " be sure they have a right," or to that effect, they admitted them. - That it had not been usual to require other evidence, unless where a doubt arose. That it was found out after the fix were admitted, that the mayor and aldermen had been imposed upon; for that some of them had no right, and that two in particular were non-resident. That he was told of this on the 9th as he came out of the hall, and that it was for this reason, and because there was a great noise and tumult in the town, that he did not keep his word about the meeting on the 16th. That it might be on the 9th that he came to this resolution of not meeting on the 16th; but that he did not communicate it to the persons whom he promised to meet on that day, not thinking it worth his while to say any thing about it. That messages were sent to him, that if he would swear in certain persons, they would vote for Gisborne. That Flint, the alderman, brought such a message. That, however, it did strike him, that, notwithstanding this promise, they *might* not vote for Mr. Gisborne. That his general answer was, that, if any were admitted on the eve of the election, it might be thought partial. That they were apprehensive of a riot by Mr. Coke's party, if they had gone to swear in burgessees, and had not admitted all who claimed, whether they had a right or not. That he canvassed twice or thrice for Gisborne, and

and met with no insult. That, if there had been no mistake about the fix, he would not have admitted any more, without calling a common-hall to his assistance, because of the extraordinary numbers that applied; but that the imposition relative to the fix confirmed him in that resolution. That, some time after the 9th, and before the 16th, he resolved, without having concerted it with any body, to call a common-hall, because he thought the old mode of proceeding was the best; but that it was not discovered or suspected before the election, that the mayor and three aldermen could not admit; and that, therefore, this was not any of his reasons for not meeting on the 16th. [337]

That, at the common hall on the 2d (1) of February, after the election, he was attended by a counsel. That a stricter mode of proof, as to the titles of the claimants, was then insisted on, than had been usual on former occasions, and that, by the counsel's advice, subscribing witnesses were required to prove the execution of the indenture. He said, that the same counsel who attended him on the 2d of February, attended also as his counsel at the election. That an agent of Mr. Wenman Coke's repaid him the fees he had given the counsel. That Mr. Wenman Coke acted as an agent for Gisborne, but that he did not believe the money was Mr. Gisborne's. That Mr. Grain- [338]

(1) The mayor was mis- hall in question having been taken in the day, the common held on the 1st.

ger, the corporation-steward, paid for the counsel's attendance on the 2d of February, and that he believed it was paid on the account of the corporation. That he saw some of the Lords Cavendish on the 16th, and perhaps on the 15th. That they had, among other things, conversed about the election. That there might be some such conversation as that if some of the claimants voted it might endanger the election; but that he remembered no particulars of any conversation, and did not recollect that any of them (the Lords Cavendish) recommended that the claimants should not be admitted. He said, on seeing the witness Cook, that he did not know him personally, but that he recollected him, and believed he saw him at a public house at the time he had mentioned. That [339] Cook was talking about voting and town's-money, but that he (the mayor) did not recollect having said, "We shall remember our friends," or to that purpose; and that, if he had said so, he should have recollected it. That he had some conversation with Cook about the town's or charity-money, but could not pretend to say what had passed on that subject.

The following order, made at the common hall holden on the 1st of February, the 2d day after the election, was read, from the hall-book.

"Common hall, 1 Feb. 1775. Before Christopher Heath, Esq; mayor, &c.

"Ordered, at this common hall, That Mr.
" mayor

“ mayor be indemnified from all expences that
 “ shall or may accrue for or by reason of his
 “ refusing to admit any person or persons to be
 “ burgesſes of this borough, and from all coſts
 “ and charges that ſhall or may fall upon him re-
 “ lative to the execution of his office in the late
 “ election.”

II. To ſubſtantiate the titles of the claimants, [340]
 which was the object of the ſecond part of the
 evidence propoſed to be given on the part of the
 petitioners, the indentures and examined copies of
 the regiſter, according to the nature of the ſeveral
 titles, were produced to the Committee. The re-
 ſidence of the claimants at the time of their claim,
 and of their fathers or maſters, and the admissions
 of their fathers or maſters before the birth or ap-
 prenticeſhip, were proved; as well as the execu-
 tion of the indentures, the actual ſervice, and that
 the claimants were of age when they applied for
 admission.

The counſel for the ſitting member did not
 controvert the ſufficiency of the proof brought to
 eſtabliſh the titles, except with regard to ſeven
 voters, *viz.* John Wedgewood, Thomas Bilſon,
 Charles Clarke, Thomas Hancock, William Mat-
 tocks, Thomas Jones, and William Sale.

1. The indenture of John Wedgewood was pro-
 duced, the execution and ſervice were admitted,
 and his reſidence at the time of the claim was [341]
 proved. To prove his age, an examined copy of
 the entry in the pariſh regiſter was produced, by
 which

which the date of his baptism appeared to be the 18th of March 1753; so that he was of age in the month of March previous to his claiming admission. But, in this entry, the name was written *Wedgeworth*. To show that this was a mistake, the parish-clerk of St. Peter's parish was called, who had been in that office before and during the year 1753, and ever since. He produced his minute-book, where, in the entry corresponding to that in the register, the name was *Wedgewood*. He said, that he always entered the baptisms in that book before they were entered in the register, and that the book had always been in his custody. It appeared, on inspection, that there had been an erasure of the last part of the word; and though he at first denied all recollection of it, and said he had never made any alteration in the book, the counsel for the sitting member, by cross examination, extorted from him a confession, that, some time before the election, John Wedgewood, and another person whom he did not know, came to him to demand a certificate. That Wedgewood said he wanted it for the purpose of being admitted, and of being a voter. That he told him his name was wrong in the book, and that he (the clerk) at his desire altered it to *Wedgewood*. Other witnesses, however, said, that they knew John Wedgewood; that his father's name was William Wedgewood; that he lived in St. Peter's parish; that John Wedgewood was apprentice to the person to whom he appeared by the indenture to have been bound, and that he was about 22 years of age or more.

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more. -No attempt was made to prove, nor was it suggested, that there existed any such person as *John Wedgeworth*. John Wedgewood was admitted a burghers, after the election.

2. Thomas Bilson had been refused his admission at the common hall on the 1st of February, because, on the back of his indenture, there was an indorsement that the master should allow him for his board; the mayor saying it was not a regular indenture. It was proved, by a fellow-apprentice, that he had served all his time with his master, and the master's admission was also proved. The master was dead at the time of the trial.

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3. Charles Clarke's indenture was produced. His master was dead. John Harrison, the surgeon, swore, that he *believed* he had served his time out; that he (the witness) was absent from Derby for about a year during the time of Clarke's apprenticeship; that, when he left the town, Clarke was with his master; and that he found him with him on his return.

4. and 5. Thomas Hancock and William Mattocks claimed also by servitude. Their indentures, service, and residence were proved; but it appeared that they were bound to a partnership of three persons, *viz.* two of the name of Hancock, and one William Goodman. That, of the three, Goodman only was a burghers. That the other two had resided all the time of the service of the two apprentices. That Goodman the burghers was also resident in Derby when they were bound, and resided there

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there the first five years of the seven; but that he then left the town, and was not a resident burghers during the *whole* time of their service. That the trade was carried on in Derby in the name of Goodman and Hancocks, and that all the three had a share in the profits.

To prove that the residence of the master (who must be a burghers) during the *whole* apprenticeship, is necessary, the following entry in one of the corporation-books was produced and read.

10th Nov. 1701. " At this common-hall, it
 " is resolved and agreed, by all the persons pre-
 " sent, (*nem. con.*) that it hath heretofore con-
 " stantly been the custom, and so remains at this
 " time, that no person or persons whatsoever
 " ought to be admitted and sworn a burghers or
 " burghesses, freeman or freemen, of this borough,
 " unless such person or persons be of the age of
 " 21 years; or unless he or they be born after his
 [345] " or their father or fathers was or were sworn a
 " burghers or burghesses of this borough; or unless
 " he or they have served as apprentice or ap-
 " prentices to *some burghers or burghesses dwelling in*
 " *this borough, by the space of seven years*; or unless
 " such person or persons be dwelling and resident
 " in the borough at the time of such his or their
 " admittance or admittances; nor ought any per-
 " son or persons to be sworn a burghers as aforesaid,
 " that hath served as an apprentice to any fo-
 " reigner, or clandestinely to any burghers, in this
 " borough; nor any person or persons that is, or
 " are,

"are, or shall be, born out of this borough, although his or their father or fathers was or were then burgessees of this borough (1)."

6. With regard to Thomas Jones, the circumstances were these. A general notice had been served on the mayor, to produce the indentures which, at the time of the applications for admission, had been left in his hands. He had not produced the indenture of Jones, but the petitioners had a duplicate of it, which they produced. It appeared that he had been bound to one Holmes; and Henry Cawley being called to prove his actual service, said, that Holmes had assigned him to his (Cawley's) father, and that he had served the whole seven years to him. Harrison, the surgeon, swore, that he saw both the indenture and assignment, or turn-over, delivered to the mayor. That, in the minutes he took at the time, it was mentioned thus: "Thomas Jones—an indenture, and "turn-over, from Holmes to Cawley." That he could not say whether the turn-over was written on the indenture, or was a detached instrument. [346]

The counsel for the sitting member insisted, that such assignment could not be proved by parole evidence. That, to entitle the counsel on the other side to offer such evidence, it was not sufficient to say that the assignment had been delivered to the mayor and he had not produced it. That

(1) *Vide* the case of *Green, v. the Corporation of Durham*, 1 Burrow, 127.

it must also be shewn, that he had received notice to produce it. That a notice to produce the indenture did not imply a notice to produce the assignment or turn-over, which, for any thing that appeared to the contrary, was a separate instrument.

On the other side, it was contended, that the notice was sufficiently comprehensive, and plainly must have been understood by the mayor as extending to all the muniments delivered to him by the claimants, as evidence of their titles.

The Committee over-ruled the objection, and all the circumstances necessary to establish the title of Jones, were proved.

7. William Sale was not *positively* sworn to have served above 5 years.

These 6 last, *viz.*—Bilson, Clarke, Hancock, Mattocks, Jones, and Sale, were not admitted to their freedom after the election.

[348] It appeared that the titles of many of the 27 had accrued 10, 20, 30, or 40 years ago. It was admitted that all the 27 had tendered their votes at the election for Mr. Coke. It was also agreed, that many persons, who had been admitted to their freedom by the mayor and three aldermen, had voted at the election; but that, of persons of this description, the numbers for each candidate were equal; *viz.* 45 for each.

COUNSEL for the Petitioners.

It is not contended, that, where the right of voting

voting is in burgeses or freemen, it is in every case necessary, that a person, in order to be entitled to vote for a member of parliament, should be actually invested with his freedom by admission. It is, on the contrary, allowed, that there are cases where persons entitled to their freedom, although they have not been actually admitted, have a right to vote. But it is said, that such cases are only those, where the persons entitled have applied in *strict form* to those who, by the law of the place, are empowered to admit, have offered to produce legal evidence of their titles, and have been refused. The persons [349] who have now proved before the Committee their titles to their freedom, applied to the mayor and three aldermen; whereas, by the constitution of Derby, the admission of freemen belongs to a meeting of 20 members of the corporation, called a common hall. Their application, therefore, it is said, was not regular, nor made to the proper persons; and, on that account, their votes ought not to be allowed. But (to repeat what was said already upon the question concerning the admissibility of the evidence which has now been produced) the strict rule contended for is not established by any *dictum* or precedent. The determinations referred to only show, that where there has been an application strictly regular, and an injurious refusal, the claimants shall, as to the purpose of voting, be considered as if they had been

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admitted;

[350] admitted; and it does by no means follow, that, in all cases where there has not been an application strictly regular, the votes are bad. The principle of those determinations is, that persons who, having titles, apply and are refused, have an equitable right to their freedom; and this principle is clearly applicable to the present instance. The persons in question applied to those, who, according to the universal belief of every body in the borough, were empowered to admit them. They applied to the mayor, who is the head of the corporation. He promised on his honour that they should be *properly* admitted. If the mayor, at that time, *did not* know the proper mode of admission, are they to suffer for not knowing more of the constitution of the borough than its chief magistrate? If he *did* know it, it was his duty to set them right; and, by not doing so, he deceived and betrayed them, and violated the oath by which he had engaged himself to execute his office with fidelity. He has been proved to have been an active friend and agent of the sitting member; and the Committee must infer, that he broke his word from partiality to him. What else could prevent him from admitting them, according to his solemn promise, in the mode which he, at the time, understood to be agreeable to the law of the place? It is manifest that he intended a fraud upon them; and fraud, when once it is proved, vitiates every transaction, and defeats every end which it was meant to

to

to obtain. This is the doctrine of courts of law, as well as of equity. They differ only in the mode of detecting fraud. In the latter, it may be proved by the oath of the party himself, which cannot be taken in a court of law.

But although, by the constitution of Derby, as it is now proved, the power of admission belongs to the common hall, it does not follow, that the application for that admission must be made to a common hall. It is the province of the mayor to assemble the common hall. An application to him for admission is sufficient. It is his business to know, that the proper meeting for that purpose is a common hall, and to summon one accordingly.

Besides, the administration of the oaths to government is a preliminary step which is allowed to be necessary before admission. The mayor, and three aldermen, are the persons appointed to administer those oaths. Till they did administer them, the claimants could not be admitted. They were applied to for that purpose, and they refused. [352]

The claimants being thus stopped *in limine*, it was impossible for them to proceed farther; and the Committee cannot presume that, when this introductory ceremony should have been performed, they would not then have applied to be admitted in the strict legal manner. Whatever evidence there may be of a general misapprehension of the law on this subject, these persons having expressed no intention as to the measures which were to be taken

taken after the administration of the oaths to government, nothing must be conjectured concerning the mode in which they would have acted. With regard to those things which men have been prevented from doing, it is but fair and just to presume, that, had they been suffered to do them, they would have done them in the manner prescribed by law.

[353] Upon the whole, the mayor, by first refusing to swear the claimants, and afterwards rejecting them at the poll, acted in the double violation of the two oaths which he had taken, as mayor and as returning officer, and their votes ought, in substantial justice, to be allowed.

COUNSEL for the Sitting Member.

The petitions, on the matter of which the Committee is sworn to determine, both allege, that Mr. Coke was elected by a majority of *legal votes*. The general question to be decided is, Whether the persons whom the petitioners desire to have added to the poll, were in truth *legal* voters at the time of the election. To prove that they were, it is said, that the manner of their application was such as to entitle them, in *substantial justice*, to be upon the poll. But it is to be hoped, that this judicature will never, by making a distinction between *substantial* and *legal* justice, open a door to that discretionary power, which, under the pretence of substantial justice, was the occasion of all the mischief

chief that attended the former mode of trying controverted elections. If the fetters of law are broken through, good men will no longer have any rule of decision but their own whim and caprice; and bad men will have a pretext for following the dictates of interest and passion. The question will no longer be, who was duly elected, but, who has the best interest with the majority of his judges.

It is surprising, that it should be denied, that a person who has any inchoate right, or who means to take any advantage to which by law he is entitled, must, in order to complete such right, or gain such advantage, take the *regular* steps which the law has pointed out for that purpose. If he blunders or mistakes in demanding what, upon a regular demand, he would be entitled to, he must suffer for it. *Vigilantibus non dormientibus jura subveniunt*. Suppose a man has the clearest title to an estate of freehold sufficient to give a vote at a county election; and suppose that, more than a year before the election, he should bring an ejectment, and should mistake the name of the parish, calling it, for instance, Highgate instead of Hampstead, he would not only lose his cause, but would certainly not be entitled to vote in right of the estate. If a clergyman has been regularly presented and instituted, yet, if he has made a blunder in his induction, he will not be allowed to vote for the county.

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It is said, that the mayor and three aldermen are

the proper persons to administer the oaths to government, and that the claimants applied *properly* as to that step; but it appears, that their application was, not to have those oaths administered to them, but *to be admitted*; and it is proved, that nobody had in contemplation any other mode of admission, but that which was illegal. It cannot, therefore, be imagined, that those men would ever have thought of a common hall. The *proper* admission promised by the mayor, could mean nothing but an admission by himself and three aldermen.

[356] If those men had not yet been admitted, and had gone to the court of King's Bench for *mandamuses*, does any body doubt, but they would have desired those *mandamuses* to be addressed to the mayor and three aldermen, as the persons appointed by the charter to admit? Suppose such writs to have issued, the mayor and aldermen, upon looking into the charter, and discovering their mistake about the constitution, would have returned, that they had no such power given them, and there would have been an end of the *mandamuses*. Others must have been procured, directed to the common hall. If, therefore, they had applied to the King's Bench in their own way, that court would not have put them in possession of their franchises. If they had been actually admitted by the mayor and three aldermen, every one of them might have been ousted by informations, in the nature of *quo warranto*. If, in consequence of such an admission, they had attempted to exercise

cise a right of common, and the owner of the land had brought an action of trespass, on * their pleading their being free of the borough, he might have proved the illegality of their admission, and must have had a verdict against them. The Committee, therefore, it is hoped, will not now put them in a better condition than they would have been in, if their own wishes had been complied with; nor deprive Mr. Gilborne of a legal objection, which, had they been admitted, he would have been entitled to make at the poll;—an objection, which lay against all those who polled in consequence of admissions before the mayor and three aldermen, but which it was unnecessary to make at the election, because the number of persons in that predicament was equally divided between the two candidates.

That fraud, when it can be proved, is held, in courts of law, as well as of equity, to vitiate a transaction founded upon it, is undeniable; but the maxim does not apply to the present case. The mayor practised no fraud on these men. He was as ignorant of the law as they were. Having [358] been imposed upon, with regard to the few whom he had admitted, and finding 92 claiming all at once, can he be blamed for delaying to admit them, even in the way which he and they thought regular, until there should be sufficient time to examine their titles? The event has proved, that his caution was very necessary; for it appears, that,
out

out of 65 of these persons, who applied at the common halls, after the election, no fewer than 38 were rejected, because their titles were defective. If it were true, that these men have been injured, they would be entitled to a remedy by actions against the mayor; but it will not be contended, that such actions could be brought or maintained. The late statute, giving costs when a *mandamus* is decided in favour of the person demanding his freedom, particularly specifies, that the application for admission must be made to the persons who have authority to admit, which evinces [359] that, if the application is not made to such persons, the law considers that no reparation shall be made, because no injury has been done.

The vague and undefined plea of substantial justice would, if it were allowed, overturn, in many instances, the most positive provisions of law. Suppose, for example, a man to have declared, over and over again, to his heir at law, and to all his acquaintance, that he meant to disinherit his heir, and leave his estate to A. Suppose him, agreeably to that resolution, to make a will, complete in every other respect, but attested only by two subscribing witnesses.—In such a case, the devisee might well insist, that, in substantial justice, he was entitled to the estate; but it will not be pretended, that he could recover it against the heir, in any court of law.—Why? Because an express law says, that no devise of lands shall be good,

good, unless it be attested by three subscribing witnesses (1). In * short, in all cases, men, who claim to have the benefit of the law, must direct themselves, in making their claim, by the rules prescribed by law. No instance has, or can be, produced, where it has been holden, that a person (be his title ever so perfect) shall be considered as possessed of any estate, office, or franchise, before he has been legally put in possession, unless where there has been a *regular* demand.

It has appeared, by the witnesses, that, on the 5th and 9th of January, the only evidence produced was indentures and certificates, neither of which are, in law, sufficient to establish the titles of the claimants. No subscribing witnesses were present, nobody to prove the actual service of the apprentices, and no examined copies of the parish registers tendered. It has, indeed, been sworn, that the usual practice was followed in this respect; but though, in cases where the titles had recently accrued, the evidence offered might be sufficient, surely it was not sufficient with regard to numbers of those who claimed on this occasion. Many of their titles were to be traced back 20, 30, or 40 years, and great caution and strict evidence were necessary in the examination. And, were nothing else offered in behalf of the mayor and aldermen, this single circumstance that such evidence was not

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(1) Stat. of Frauds, 29 Char. II. cap. 3.

produced

produced is sufficient to justify them in their refusal to admit the claimants.

The counsel for the petitioners, in reply,

[362] Besides enforcing, and enlarging upon, their former arguments, observed, That the words "*legal votes*," in the petitions, could never be confined to their strict technical meaning, or held to refer only to the votes of men who were rigidly legal freemen. That, if they were so construed, they would exclude every one who was not admitted; though he should have applied according to the most exact forms prescribed by the constitution of the place;—a doctrine which was not maintained, even on the part of the sitting member. That petitions, were the words of them to be so nicely weighed, would become as technical as *declarations*, and would be infected with all the disgraceful punctilios of special pleading (1). That the act of 12 Geo. III. only meant to point out in what manner applications were to be made, in order to entitle persons, claiming their freedom and being refused, to the reparation given them by that statute. That, in regard to every other purpose, it left the law as it stood before, and therefore did not at all affect the present question. That it had been said, on the other side, that, as this was a cause between Coke and Gisborne, the conduct of the returning officer, even if culpable, ought not to deprive the sitting member of a fair advan-

(1) *Vide Supra*, p. 15. Case of Petersfield, Note (A).

tage which the law had given him; but that to this the answer was, that the mayor had been proved to be Gisborne's agent, and therefore Gisborne ought to suffer for *his* improper conduct. That, though the mayor might not be liable to civil actions for his refusal to admit the claimants, yet, perhaps, under all the circumstances of the case, he and the other persons concerned might be indicted for a conspiracy to deprive them of their votes. That, although the mayor, by his oath of office, does not swear *specially* any thing relative to the admission of freemen, yet the general engagement that he will well and truly execute his office, binds him not to refuse injuriously any persons who have a right. That nothing had been said to show that the application of the claimants was not strictly regular for the purpose of having the oaths to government administered, for that no written or formal notice or demand was necessary for that end, nor any particular set of words. That they certainly meant to take those oaths in the first place, and having been stopped there, the Committee ought not to presume that they would have acted improperly in the business which was to follow. That, however, it was far from being an incontrovertible proposition that their votes would have been bad, had they actually been admitted by a mayor and three aldermen: for that, if they had been *de facto* in possession of their franchise at the time of the election, and had not been proceeded against by information, (there having been sufficient time

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time to have questioned them in that manner) the Committee would not have taken upon themselves the task of inquiring into the mode of the admissions, but would have allowed their votes (C). That it was no excuse for the mayor to say, that, on account of the number of the claimants, and the antiquity of some of their titles, great caution was necessary, lest persons not fairly entitled should be admitted, for that the same caution was *always* necessary. That there surely had been sufficient time between the beginning of January and the election, to scrutinize their proofs; and that the mayor, by appointing the 15th for the admission of those who should be found to have a right, allowed that from the 9th to that day there was

[365] sufficient time for the purpose. That nothing can be concluded against the claimants because they did not come accompanied with every evidence which would be necessary to prove their titles, if questioned in a court of law. That it was enough for them to bring with them such evidence, and no more, as, by the usage of the place, had always been thought sufficient. That surely the Committee would never make it a rule, that persons, when they claim to have a right completed by admission, which is afterwards found to be incontrovertible, should come armed with strict legal evidence, or else lose all benefit of their claim.

That, as to the cases of a mistake in the name of the parish in an ejection, or of a blunder in the induction of a parson who has been regularly presented

fented and instituted, they were not parallel to the present. That it cannot be presumed, that a man, who is entitled to an estate, should be ignorant of the parish in which it is situated. If he is, it is manifestly his own fault, because certain information must be open to him. That, in like manner, if a person is ignorant of the proper form of induction, it must be owing to his own neglect. That there is no *communis error* in those instances, as in the present, where every body, from whom information could have been sought, would have said, that the proper persons to admit were the mayor and three aldermen. That the case of a devise of lands, subscribed by only two witnesses, was as little applicable here, for that such devises are expressly annulled by a positive act of Parliament. But that no law has yet declared that the demand of persons, applying as the claimants have done, shall go for nothing, and that they shall derive no benefit from it. [366]

The counsel having closed their arguments, it was agreed on the part of Mr. Gisborne, that, if the votes of all the 27, or of a great majority of them, should be allowed, the majority on the poll must be in favour of Mr. Coke. But it was understood, that, notwithstanding this agreement, the counsel for the sitting member would still be at liberty to bring any charge against him (Coke) which might tend to avoid the election; and it was also understood, that, if the Committee should either reject all the [367]

27, or such a number of them as would leave the majority of legal votes on the side of Gifborne, the counsel for the petitioners would, in such case, be free to go on with evidence, to add other votes to their own poll, or take off votes from that of the other side; and that the sitting member would have the same thing in his power, when the case of the petitioners should be closed.

The Committee, after long deliberation, both on the 7th of February, the day the counsel finished, and on the 8th, came to the following resolutions:

Resolved, "That those persons who applied to the mayor on the 5th and 9th (February, 1775), and have proved their rights, be added to the poll."

[368] Resolved, "That John Wedgewood be added to the poll."

Resolved, "That Thomas Bilson be added to the poll."

Resolved, "That Charles Clarke be added to the poll."

Resolved, "That Thomas Hancock and William Mattocks be added to the poll."

Resolved, "That Thomas Jones be added to the poll."

These six resolutions were entered in the minutes, which, as is usual, were communicated to the parties; but they were not delivered by the Chairman to the counsel when they were called in.

He

He said, he was directed by the Committee to inform them, that they had come to this general resolution:

Resolved, "That all the 27 voters in question, except William Sale, ought to be added to the poll."

Upon this, the counsel for the sitting member told the Committee, they were instructed to say, [369] that they would not give the Committee any farther trouble on the part of their client.

And the same day, (Thursday, the 8th of February,) the Committee, by their Chairman, informed the House, that they had determined,

That Daniel Parker Coke, Esq; the petitioner, was duly elected, and ought to have been returned (1).

(1) Votes, p. 261.

N O T E S

ON THE CASE OF

D E R B Y.

Note
(A.)

PAGE 298. (A.) After the merits of the election had been decided by the Committee, another attempt was made to obtain, from the court of King's Bench, informations against the honorary burgesſes; but as the new affidavits produced on this occaſion did not yet ſeem to the court to contain ſufficient ground for calling their right in queſtion, this application was as unſucceſſful as the former. If the privilege of making honorary burgeſſes who have a right to vote is, in fact, as great a grievance, in this and many other boroughs of the kingdom, as it is alleged to be, an effectual remedy can only be adminiſtered by the legiſlature. See the Caſe of Bedford, *ſupra*, vol. ii. p. 81, to 92.

Note
(B.)

P. 319. (B.) Some may think I have been too circumſtantial in giving a detail of the evidence in this caſe, but thoſe who are ſufficiently aware of the nicety of the queſtion will judge otherwiſe. We muſt, I think, conclude that the Committee conſidered *every* circumſtance of the claimants' condu.

Notes on the Case of Derby.

371

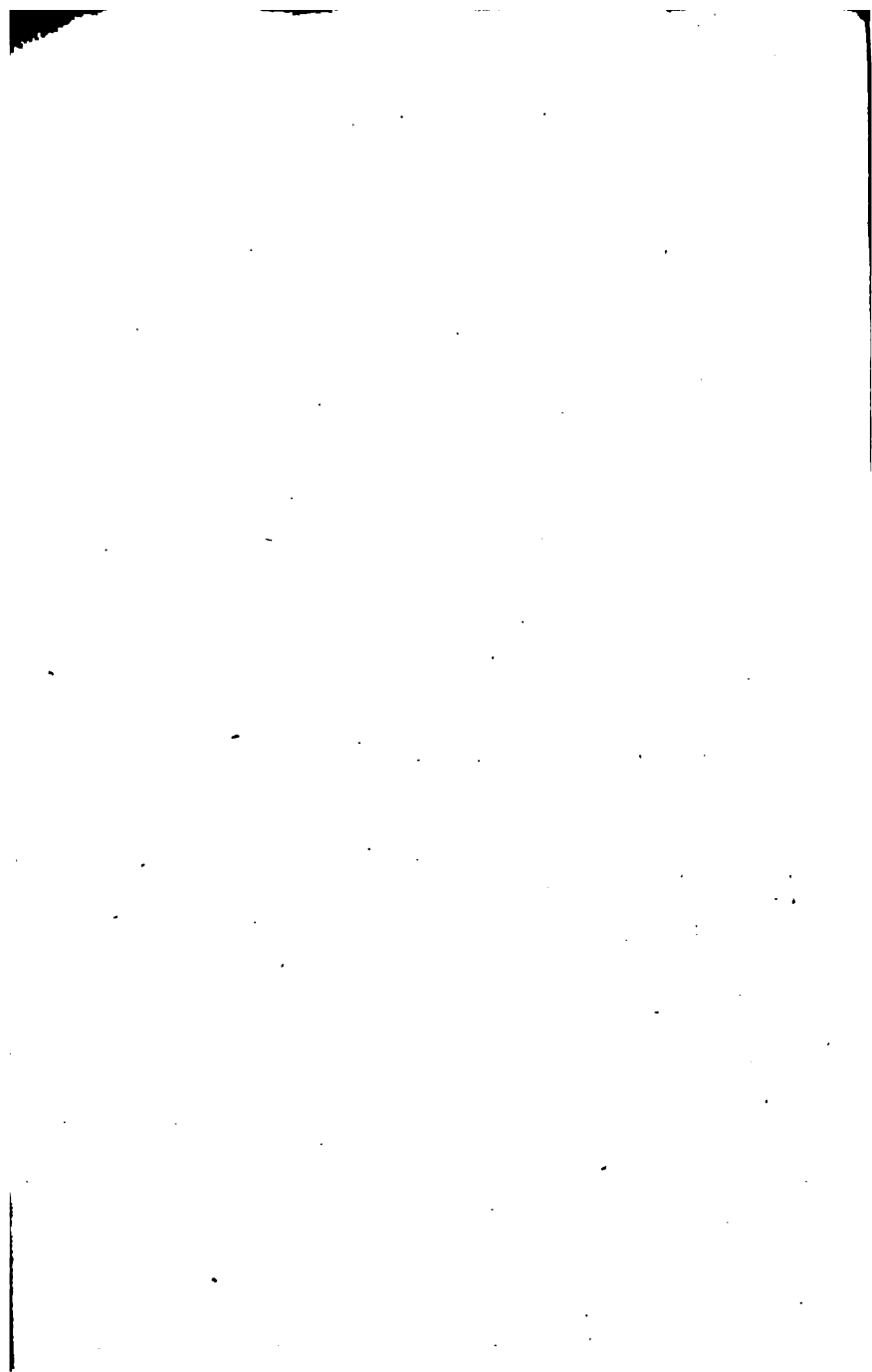
conduct in making their different applications, and every circumstance of partiality attending the repeated delays and ultimate refusal by the mayor, as necessary, in order to compensate for the want of legal propriety in the kind of application which was made. If *all* those circumstances had not concurred, we have no right to infer that the Committee would have put those men in as good a condition, as if their demand had been strictly regular.—Hence it was necessary to state every one of those circumstances, and to set forth how, and by what witnesses, they were proved.

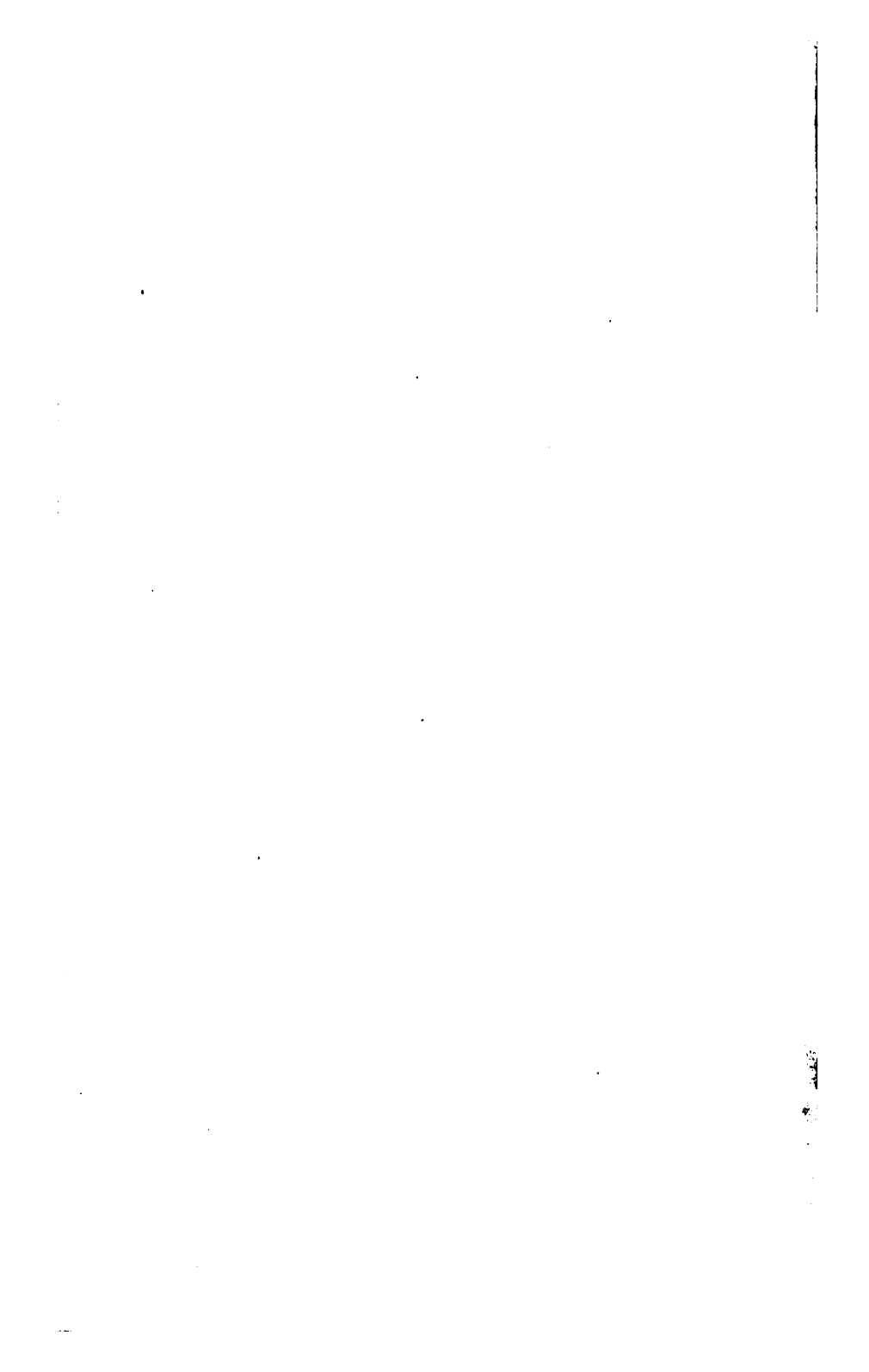
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(B.)

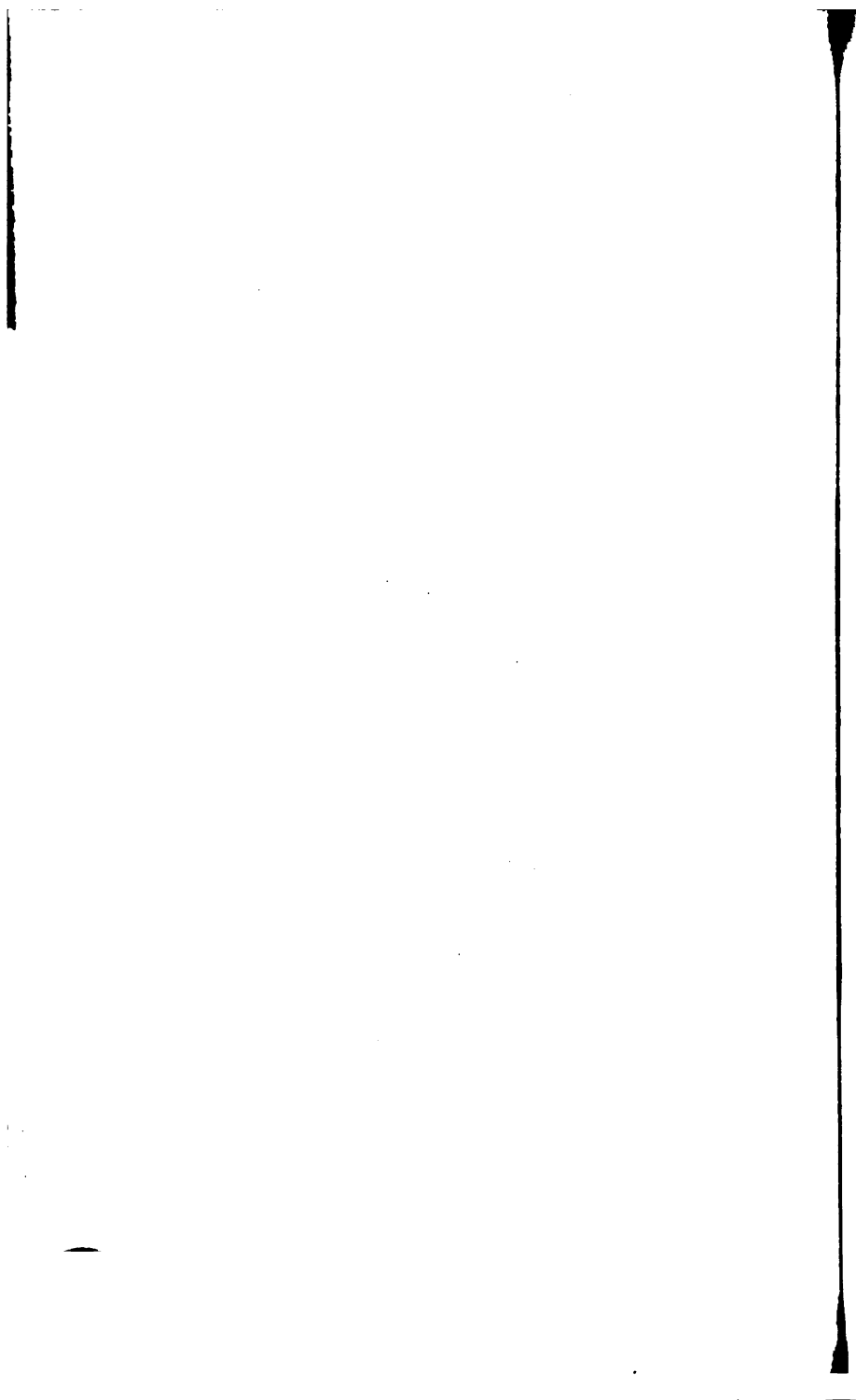
P. 364. (C.) It has been shewn in a former note, (*supra*, p. 145.) that when the right of persons to be freemen has been brought before Committees, as a preliminary question necessary to the decision of their right to vote, such right has been frequently gone into, in cases where such persons having been long enough in possession of the franchise for informations to have been brought against them, none has been applied for, or obtained.

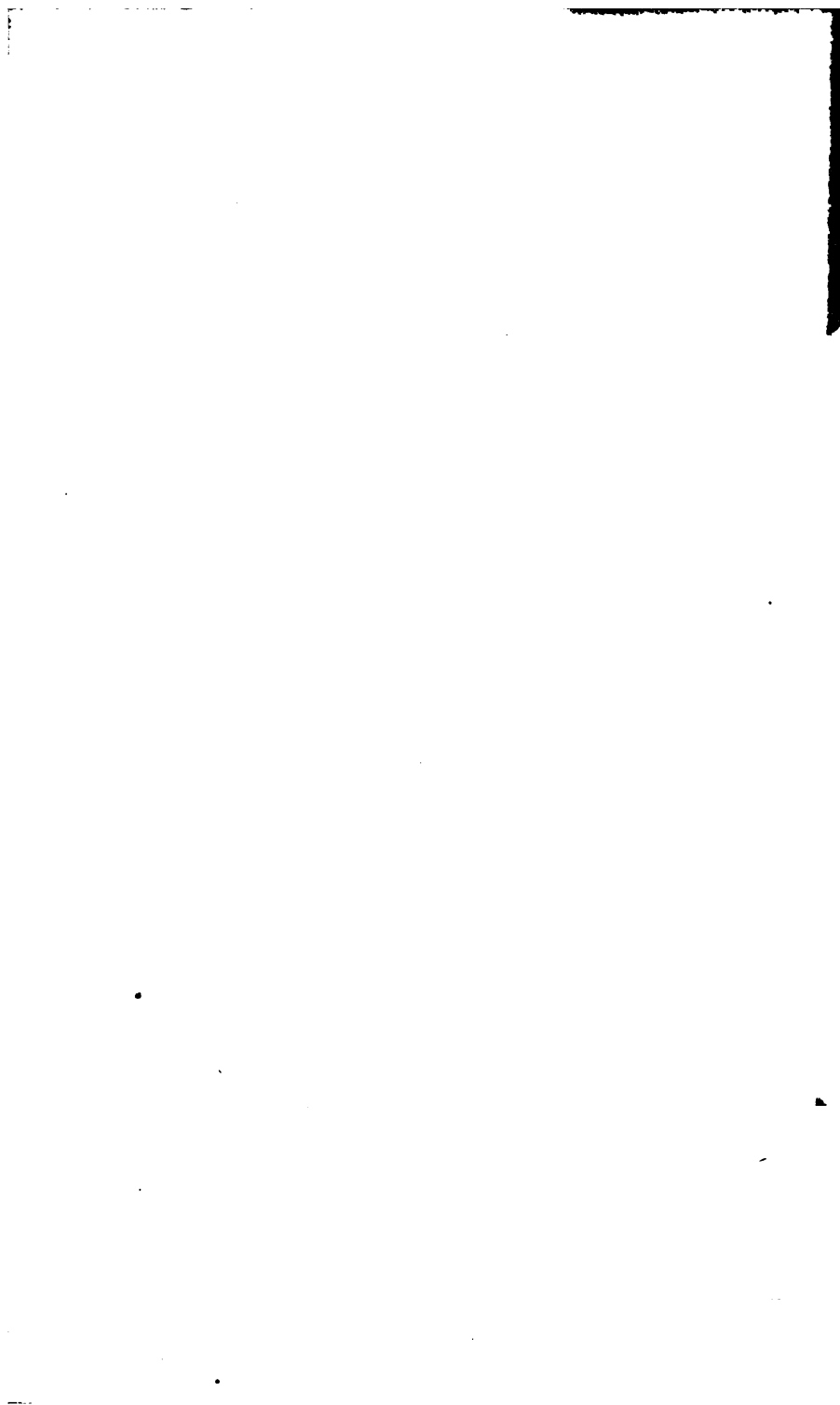
Note
(C.)

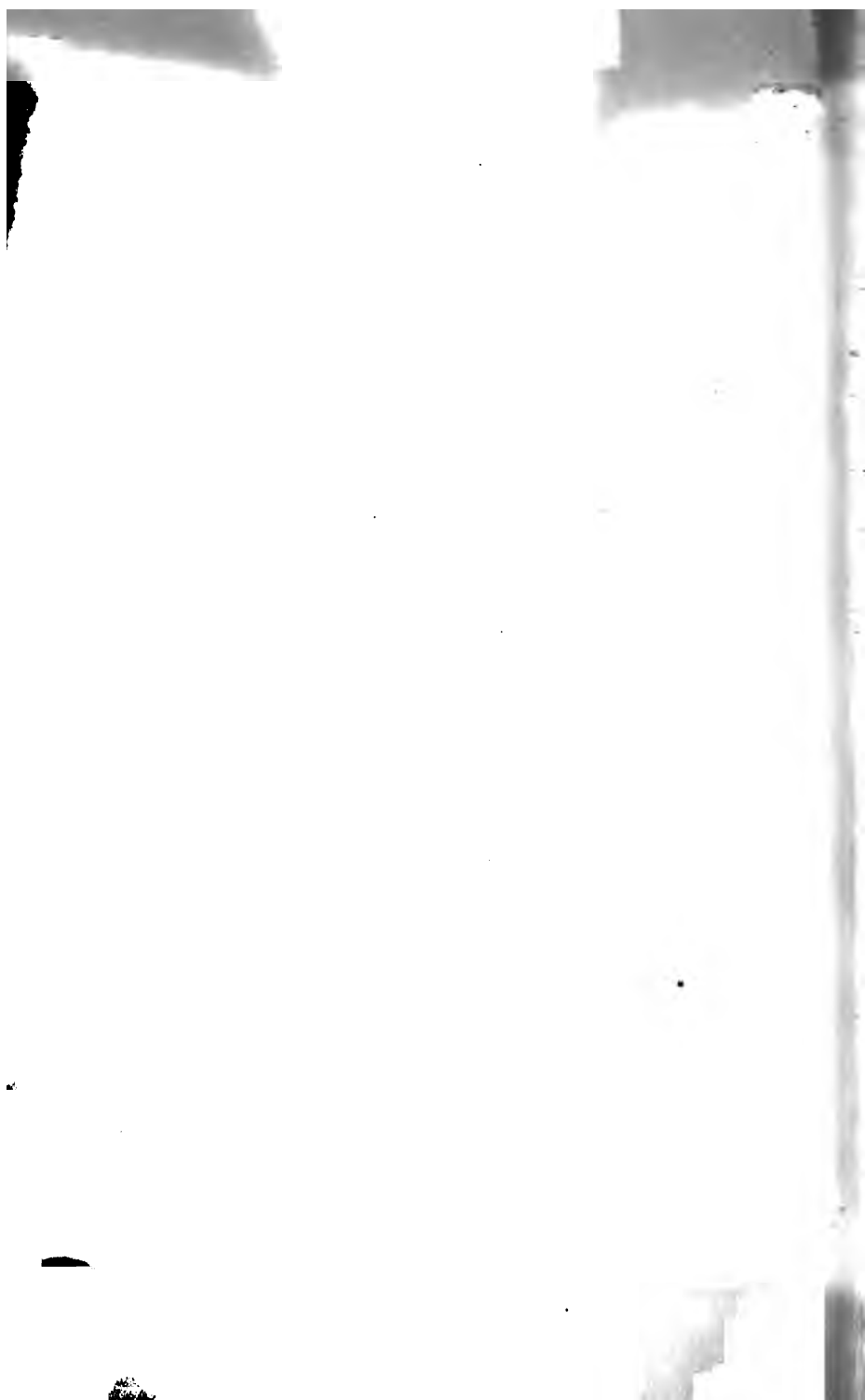
END OF THE THIRD VOLUME.











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